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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 613.

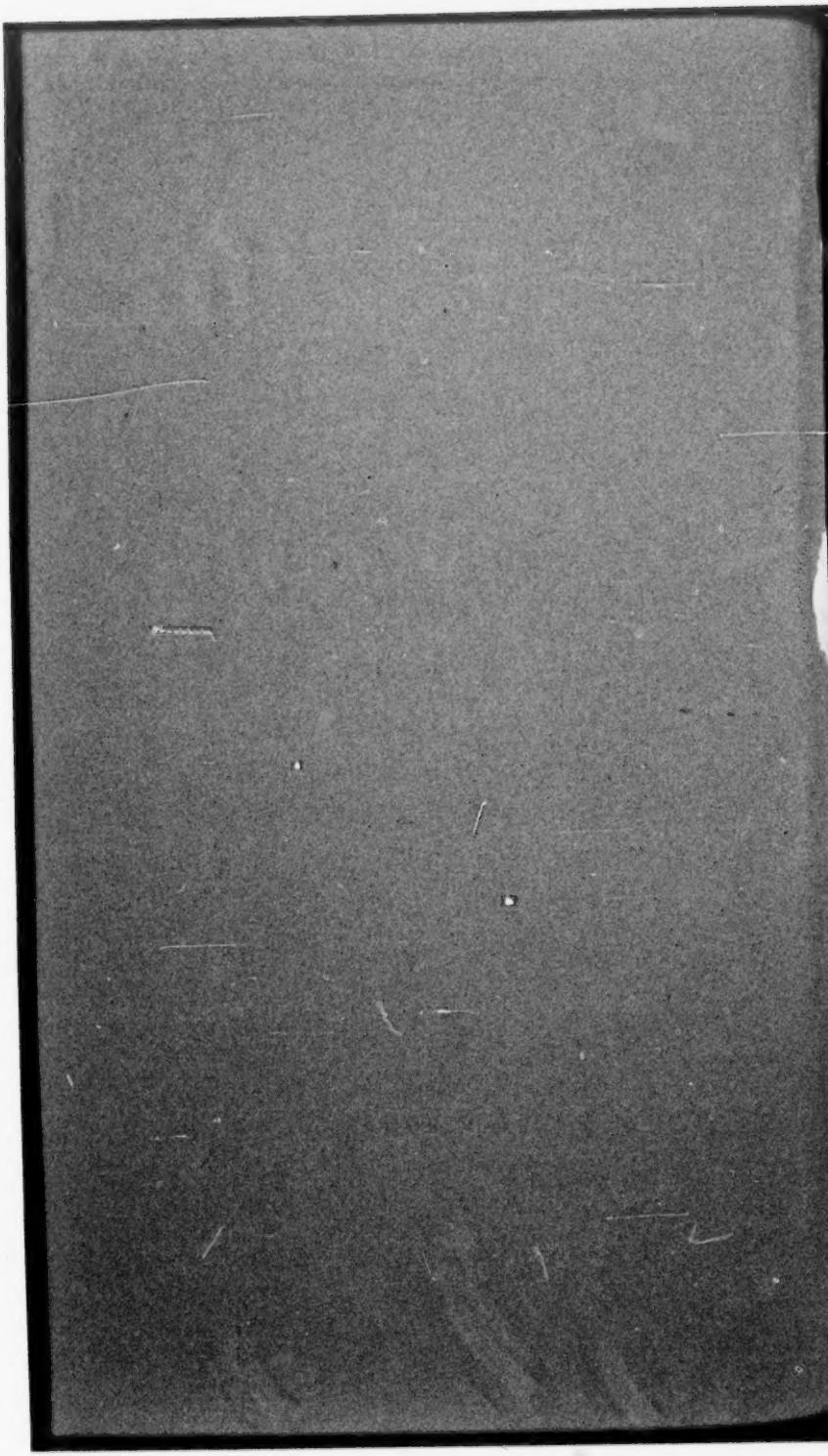
PECOS & NORTHERN TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

MRS. M. A. ROSENBLOOM, FOR HERSELF AND IN BEHALF OF MILTON ROSENBLOOM ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED AUGUST 28, 1915.



(24,896)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 18, 1916.

1

Caption.

THE STATE OF TEXAS,
County of Potter:

Be it remembered, that at a term of the Honorable District Court, begun and holden within and for the County of Potter, at the Court House thereof in the City of Amarillo, Texas, on the 11th day of July, A. D. 1910, and which adjourned on the 1st day of October, A. D. 1910, before the Honorable L. C. Barrett, Special Judge, presiding when the following styled and numbered cause was tried, to wit:

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.

2

Plaintiff's Third Amended Petition.

Filed June 8th, 1910.

In the District Court of Potter County, Texas, July Term, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.

To the Honorable J. N. Browning, Judge of said court:

Now at this time comes Mrs. M. A. Rosenbloom for herself and as next friend for her minor children Milton and Matilda Rosenbloom, and for the use and benefit of Minnie and Isaac Rosenbloom, and leave of the Court first being had for that purpose, files this her third Amended petition in lieu of her Second Amended Petition filed herein on January 14, 1910, and would respectfully represent and show to the Court that she is the surviving wife of M. A. Rosenbloom, deceased, that Milton Rosenbloom a boy about two years old and Matilda Rosenbloom a girl born since the institution of this suit and about three months old, are the children and only children of this plaintiff and M. A. Rosenbloom, deceased; that Minnie Rosenbloom is the mother and Isaac Rosenbloom is the father of said M. A. Rosenbloom, deceased; that this plaintiff, Mrs. M. A. Rosenbloom prosecutes this suit for herself and for the use and benefit of the father and Mother, as above stated, of the said M. A. Rosenbloom, deceased, and as next friend for her minor children as above stated.

Plaintiff says further that the defendant, the P. & N. T.
3 Railway Company is a corporation duly incorporated under the laws of the State of Texas, and operating its lines of railway through Potter County, Texas, and has a local office and agent in said County and State, Defendant's said agent being —— ——, who resides in said county and State. Plaintiff would further represent and show to the Court that the plaintiff has extensive switch yards situated in the southeastern part of the City of Amarillo; that it has one main line extending in the general direction of North and South and seven switch tracks all situated East of said Main line and running almost parallel with said main line; that said switch yard is what is known as said defendant's switch Yard extending from about 10th Street to 22nd Street in said City of Amarillo; that defendant used said switch tracks in its yards for the storage of a great many cars, engines, etc., and on and along said switch tracks operates a great many trains, cars, engines, etc., in both directions.

Plaintiff would further represent and show to the Court that on and for a short time prior to November 27, 1909, her said husband, M. A. Rosenbloom, was in the service of the defendant Company in the capacity of Ticket Clerk, and his duties as such ticket Clerk required him to be in and at said defendant's Yards as above described for the purpose of taking the number of all cars going out of said yards and preserving a record of same and for the purpose of sealing all cars going out of said yards that needed to be sealed.

Plaintiff says further that the space between switch tracks
4 No-. 4 and 5 is only about 6 feet and that when trains are in motion running abreast with each other on said two tracks Nos. 4 and 5, that there is very little open space between said two tracks, barely enough for a man to stand in said open space and not be knocked down and run over.

Plaintiff says further that on or about the 27th day of November, 1909, at about 6 o'clock P. M. there was a long freight train consisting of about thirty cars situated on Switch Track No. 4, and that as was the duty of her said husband, M. A. Rosenbloom, he was in said yards between tracks Nos. 4 and 5, getting the numbers of the cars in said freight train; that while her said husband was engaged in said duty said freight train was moving out on its regular run and was moving out along said switch track No. 4, and that he- said husband was between said tracks Nos. 4 and 5 with his face towards the North in the same direction in which said freight train was moving and was walking along by the side of said freight train for the purpose of observing and getting the numbers of the cars in said freight train while the same was pulling out. Plaintiff says further that while said freight train was moving out her said husband was engaged in the performance of his regular duties, as above stated, and while exercising all due care and caution, that an engine in charge of the employes of the defendant Company at a very high rate of speed, pushed a ballast car down Track No. 5 in the same direction in which said freight train was moving; that said engine pushing said ballast-
car, which was about 40 feet long and a very wife car extend-
5 ing for over track No. 5, ran or pushed up behind her said husband, and without ringing the bell or giving any other

sufficient notice to apprise her said husband that said ballast car was approaching behind him, ran said engine and ballast car with great force and violence, and without any sufficient notice or warning to her said husband; that said engine and ballast car was approaching and struck her said husband with great force and violence and knocked him down and ran over him and crushed him to death.

Plaintiff would further represent and show to the Court that when said engine and ballast car was running along by the side of said freight train, said freight train being on Track No. 4, and said engine and ballast car being on track No. 5, that the open space between the said two tracks was very narrow, and a man situated between said two tracks while said cars were moving, if he happened to move the least bit to one side or the other of said open space, or if he happened to stumble the least bit or throw his body to one side or the other in the slightest degree, that he would be struck by one of said two trains; plaintiff says further that as said switch engine pushing said ballast car approached her said husband from behind, and alongside of said freight train, and long before the same reached the point where her said husband was, that all of the crew in charge of said switch engine and ballast car saw her said husband and saw that he was in great danger of being run over and killed; that all of said
6 train crew saw and realized that her said husband was placed in a dangerous and perilous situation, and knew that if such engine and ballast car approached to a point where her said husband was without his being apprised of the approach of the same, that he was liable to become confused and, in attempting to escape, liable to be caught by one of said trains, and said crew in charge of said engine and ballast car knew that if her said husband stumbled the least bit or made any misstep, throw his body to one side or the other, that he was liable to be knocked down and run over by one of said trains; plaintiff says further that said switch engine was defective and had defective *breaks*, and that there were no air *breaks* whatever on said ballast car, and that defendant's employes in charge of said engine and ballast car knew all of said facts, and knew that if they approached and run on to her said husband from behind without his being apprised before hand that said switch engine and ballast car were approaching, that her said husband would be placed in great danger and in a perilous situation, and would likely be run over and killed, or could have known all of said facts by the exercise of ordinary care.

Plaintiff would further represent and show to the Court that notwithstanding defendant's employes in charge of said switch engine and ballast car knew all of the facts as above set out, yet the defendant company, through its said employes in charge of said switch engine and ballast car, negligently, carelessly, wrongfully, and without any regard for the safety of plaintiff's said husband, without
7 ringing the bell on said switch engine and without properly sounding the whistle on said engine, and without taking any other proper and necessary precaution to notify her said husband of the approach of said engine and ballast car, and without slacking the speed of same, negligently run said engine and ballast car at a very rapid rate of speed approaching her said husband from behind,

and while he was engaged in observing said freight train, and that when said engine and ballast car were within some 18 or 20 feet of her said husband, her said husband not know- of the approach of same, or becoming confused at the unexpected and near approach of same, attempted to step across said switch track No. 5, and was knocked down and run over by said ballast car and engine and killed, and that the negligence of the defendant Company in the manner in which they operated said engine and ballast car as above stated, and their negligence in failing to warn her said husband of the approach of said car was the proximate cause of her said husband being run over and killed.

Plaintiff says further that long before said engine and ballast car came along by the side of said freight train and to the point where her said husband was that the defendant Company, through its said employes in charge of said switch engine and ballast car, saw her said husband and knew and realized that her said husband was placed in a dangerous and perilous situation, and that when said switch engine and ballast car were within 20 or 25 feet of
8 plaintiff's said husband, he, as above stated, attempted to cross said track No. 5, and was thus placed in great danger of being run over and killed, and that defendant, through its employes in charge of said switch engine, saw her said husband when he started to cross said track No. 5, and knew and realized that — was placed in great danger and in a dangerous and perilous situation and was likely to — run over and killed, and thus being apprised of the perilous situation of plaintiff's said husband, it was the duty of the defendant, through its said employes in charge of said switch engine and ballast car, to use every means at their command *to*nsistent with the safety of their said engine and ballast car to avoid running down and killing her said husband; that the defendant, through its said train crew in charge of said switch engine and ballast car, after discovering the dangerous situation of her said husband, could have stopped said switch engine and ballast car and thereby avoided running down and killing her said husband, or they could have slowed the speed of said engine and ballast car so as to avoid injuring and killing her said husband; or they could by properly warning her said husband and notifying him in time, avoided running down and killing her said husband, yet plaintiff says that notwithstanding the defendant, through its employes in charge of said switch engine and ballast car, knew of the perilous and dangerous position in which her said husband was placed, notwithstanding it was their duty to exercise every means at their command to avoid running down and killing her said husband, yet plaintiff says that the de-
9 fendant's employes in charge of said switch engine and ballast car negligently failed and refused to exercise all of the means at their command to stop said switch engine, to slacken the speed of same or to properly warn her said husband of the approach of same, or to, in any other way, exercise any proper means for the purpose of avoiding the running down and killing of her said husband, and that the negligence of the defendant Company, through its said train crew, in charge of the engine and ballast car as above set out, was the approximate cause of her said husband being run down and killed.

Plaintiff would further represent and show to the Court that by reason of the negligence of defendant Company as above stated, that her said husband was knocked down by said ballast car and engine, and was run over by the great iron wheels of said car and engine and his head cut off and his body mangled and his life was instantly crushed out; that her said husband at the time of his wrongful killing by the defendant as above stated was a young man only 26 years of age; that he was well educated; that he was at the time making $60.00 per month and was in line of promotion, and had he not been killed by the wrongful acts of the defendant Company, he would have been promoted in his line of work in the railway service until he could and would have been able to have made from $100.00 to $150.00 per month; that her said husband was kind and affectionate to her and her said children; that he contributed practically all that he made to the support of this plaintiff and her children
10 and his parents, *that* said Minnie and Isaac Rosenbloom; that he was a man free from vicious habits, was moral and upright, that he was a strong, healthful man and had he not been killed by reason of the wrongful conduct of the said defendant Company, he would have lived probably forty years longer and would have been able to make from $100 to $150.00 per month; the greater part of which he would have contributed to the support of this plaintiff and her children and his said parents; yet plaintiff says that by reason of the wrongful conduct of the defendant Company, her said husband was killed and that she and the other plaintiffs will be by reason thereof deprived of his said earnings to their damage in the sum of $30,000.00.

Premises considered, plaintiff prays that on final hearing hereof that Plaintiff have judgment for damages in the sum of Thirty Thousand and no/100 Dollars, and that same be apportioned among plaintiffs, and for costs, and general and special relief, legal and equitable, as her cause merits, as in duty bound she will ever pray.

COOPER & STANFORD,
Attorneys for Plaintiffs.

Filed June 8th, 1910. Frank Wolflin, District Clerk.

11 *Defendant's Amended Original Answer.*

Filed August 17th, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Railway Company.

Now comes the defendant in the above entitled and numbered cause, and by leave of the Court, amends its original answer filed

herein on the 11th day of January, 1910, so as to answer herein by special plea to the jurisdiction of the Court, by demurrers and pleas in order herein presented, as follows, to-wit:

I.

Defendant excepts and objects to the jurisdiction of this Court over the matters sought to be put in issue by plaintiffs' petition and says this Court is without jurisdiction over the matters in controversy herein, for this: Defendant is, and was at the time of the accident in question, a common carrier of freight and passengers by rail, and, as such engaged in interstate commerce; and the deceased, M. A. Rosenbloom, if an employee of defendant at all, at the time of his death as alleged by plaintiff, was so employed and engaged as that he was at the time himself engaged in interstate commerce as such agent and employee of defendant, for this, that defendant together
12 with its connecting lines of railroad owned and operated by the Eastern Railway Company of New Mexico, The Southern Kansas Railway Company of Texas, and the Atchison, Topeka & Santa Fe Railway Company, were transporting and carrying by rail interstate, into and through New Mexico, Texas, Oklahoma, Kansas and other States, and between various points in such different states and territories, on through bills of lading and waybills; and as a part of such business of interstate carrier defendant had deceased M. A. Rosenbloom employed, his duties among other things, being to keep a record and account of cars and freight coming to this defendant, interstate, from such other lines, and carried over its lines and delivered by it to such other connecting carrier to be by them carried interstate to determination, and as well to inspect and seal car doors, to prevent loss and theft of such freights being so carried interstate. And at the time and immediately preceding the time of the death of M. A. Rosenbloom he was so engaged as yard clerk checking a train of freights and cars which had come to this defendant's line from the Eastern Railway Company of New Mexico, and checking out and delivering such freight and cars to the Southern Kansas Railway Company of Texas, to be by it carried over its line and connecting lines, interstate, to destination, such cars in said train were loaded almost exclusively with such interstate freight.

Wherefore defendant says that said cars and freight were subject to the rules and regulations of the Interstate Commerce Act, and especially to the act of April 22, 1908, Chapter 149, 35 Stat-
13 ute, L 65, referred to as an act relating to the liability of common carriers by rail of their employes in certain cases, and that whatever rights plaintiffs have, if any, arise out of said Act of Congress and are exclusive and supercede all other rights, if any they may have had, and that the United States Circuit Court alone has jurisdiction over the matters alleged and sought to be adjudicated by plaintiffs' petition, so that such jurisdiction is exclusive and this Court entirely without jurisdiction. And defendant now here pleads such want of jurisdiction and prays the order and judgment of this Court, dismissing this cause for want of jurisdiction, for costs, etc.

II.

The defendant demurs to plaintiff's amended petition and says the same is insufficient in law; and of this it prays the judgment of the Court, for costs, etc.

III.

Defendant further demurs to plaintiffs' petition and says the same is insufficient, as follows:

1st. It fails to allege facts showing whether or not the defendant was engaged in intra-state or inter-state commerce at the time of the death of M. A. Rosenbloom, and further fails to allege facts showing whether said cars that he was inspecting, listing and sealing, and in connection with which he was working at the time were loaded with goods freights being inter-state or intra-state.

2nd. Said petition fails to allege facts showing that plaintiff is entitled to sue and recover in the capacity in which she sues.

14 3rd. Said petition fails to allege facts showing that the injuries alleged were the natural consequences and probable result of the acts of negligence alleged, and shows that the alleged injuries were speculative, uncertain and remote contiguous, so that the defendant's employes could not at the time have been expected to anticipate the death of M. A. Rosenbloom as the natural and probable consequence of the acts by them committed.

All of which defendant prays the judgment of the Court for costs, etc.

IV.

Defendant denies, all and singular, the allegations in plaintiffs' petition contained, and demands strict proof of the same.

Wherefore, defendant puts itself upon the Country and prays the judgment of the Court for costs, etc.

V.

The defendant, by way of further and special answer herein, set up the following:

1st. That the defendant is a corporation duly incorporated under the laws of Texas, owning and operating a line of railway extending from Amarillo, Potter County, Texas, in a southwesterly direction, to a line on the boundary line between New Mexico and Texas, at or near Texico, New Mexico. The Eastern Railway Company of New Mexico is a corporation incorporated under the laws of the Territory of New Mexico and owns a line of railroad extending in a westerly direction from Texico through the Territory of New Mexico, its said line joining and connecting with the line of the defendant at

15 Texico, the Southern Kansas Railway Company of Texas, is a corporation incorporated under the laws of the State of Texas, and owns and operates a line of Railroad extending from Amarillo, in Potter County, Texas in a northeasterly direction to a point on the line dividing Texas and Oklahoma, at or near Higgins, in Lipscomb County, Texas; and the line of said Southern Kansas

Railway Company connects with that of the defendant at Amarillo, Texas, so that said companies own connecting lines and are common carriers. The Atchison, Topeka & Santa Fe Railway Company is a corporation incorporated under the laws of the State of Kansas and owns and operates a line of Railroad extending from said point on the State line near Higgins in a Northeasterly direction through Oklahoma, Kansas and Missouri, and its said line in turn connects with that of the Southern Kansas Railway Company of Texas. Each and all of said companies form and are owners of connecting lines and as such are engaged as common carriers, carrying and transporting by rail, freight interstate, and are engaged in interstate commerce. At the time of the accident in question this defendant, with its said connecting carriers, were engaged in interstate commerce, carrying freight and passengers for hire over their respective lines of railroad interstate, on through billings, and the freight train with which and around which the deceased, M. A. Rosenbloom, was at work, at and immediately and prior to the time of his death, was a train loaded principally with freight being transported inter-
16 state and being used in such interstate commerce; and the acts and duties of the said M. A. Rosenbloom in connection therewith were acts of interstate commerce being done and perfected by him as an employee of this defendant, and his acts were such as were necessary to a proper handling and transportation of said freights in said train.

By reason of such interstate commerce and such use of said train and said work of said M. A. Rosenbloom, the acts and transaction of the defendant, as well as its connecting carriers, and connected therewith was subjected to and governed by the Federal laws enacted to govern the same, and especially an act relating to the liability of Common carriers by rail to their employes in certain cases, being known as the act of April 22nd 1908, Chapter 149, 35th Statute, L, 65; which said statute and act this defendant says is exclusive of matters of dispute and controversies arising from injuries sustained by employes of such interstate carriers while so engaged in such interstate commerce and such act exclusively controls in the matter of plaintiffs' right to recover for the alleged death of her said husband, and as well gives the Federal Court exclusive jurisdiction over such, claims and controversies. And the defendant now here pleads said Act and its right to have the matters arising out of such transactions, the same being Federal question, adjudicated and determined in the Federal Courts; and as well says plaintiff has no right to recover herein in the capacity in which she sues, and such suit by her is not authorized by said Federal Statute. All of which the defendant is ready to verify.

17 2. Defendant says that the deceased M. A. Rosenbloom was himself negligent and that his negligence and carelessness was the proximate and producing cause of his injuries and that he was grossly negligent and careless, and that had he used reasonable care for his own safety, said accident would not have happened, and his negligence as compared with that of defendant (if any upon the part of defendant) was so much greater as that the defendant is not

liable for any, or if any, a small portion of the damages resulting from the death of said M. A. Rosenbloom. All of which defendant is ready to verify.

3. Defendant says that deceased, M. A. Rosenbloom, knew, at the time he accepted and entered upon such employment and undertook the work in which he was engaged at the time of his death, of the condition of the tracks and yards on which he was working, and as well that trains frequently moved, and did move and were liable to move at any time along and over said tracks, and as well of danger accident and — connected therewith. It further says that if he did not in fact actually know of such conditions and dangers the same were open and apparent such as he reasonably could and must have known in the exercise of reasonable care for his own safety. So knowing such dangers, said M. A. Rosenbloom voluntarily entered upon and undertook such work and assumed all risks and dangers incident thereto, and the accident resulting in his death was such that he reasonably should have known, and did know, of the probability thereof, of his conduct and he voluntarily went thereabout
18 engaged in such immediately preceding the time of his death, assuming all the risks of such dangers, and voluntarily conducted himself in a careless and negligent manner, thereby causing and producing his own death by his own carelessness and assumption of such risk without any concurrent negligence upon the part of the defendant or its servants or employes. All of which defendant is ready to verify.

Wherefore the defendant prays the judgment of the Court that plaintiff take nothing by her said suit against this defendant and that it be discharged to go hence without day, as well as for general, legal and equitable relief.

MADDEN, TRULOVE & KIMBROUGH,
Attorneys for Defendant.

Filed August 17th 1910. Frank Wolflin, District Clerk.

19 *Plaintiffs' Exceptions to Defendant's Answer.*

Filed June 8th, 1910.

In the District Court of Potter County, Texas, January Term, A. D. 1910.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas —.

Now at this time comes the plaintiff and demurs to the Special answer of the defendant filed herein, the same being paragraph four, of defendant's original answer herein, and says that the same is

wholly insufficient in law and constitutes no defense whatever, and of this plaintiff prays judgment of the Court.

COOPER & STANFORD,
Attorneys for Plaintiff.

For special exception herein, plaintiff says that defendant's special answer to the jurisdiction is wholly insufficient in law, because as is shown by the allegations of said answer, the defendant the P. & N. T. Ry. Co. is a Texas Corporation, duly incorporated under the laws of the State of Texas, and that plaintiff's husband was killed by the employes of the defendant Company and that the allegations of said special answer show affirmatively that this Court has jurisdiction to hear and determine this cause, and of this plaintiff prays judgment of the Court.

COOPER & STANFORD,
Attorneys for Plaintiff.

And further pleading herein, if the same be necessary, plaintiff denies all and singular the allegations contained in defendant's
20 said original answer and of this she puts herself upon the country and prays for judgment as prayed for in her original petition.

COOPER & STANFORD,
Attorneys for Plaintiff.

Filed June 8th, 1910. Frank Wolflin, District Clerk.

Plaintiffs' Special Exceptions to the Defendant's Plea to the Jurisdiction.

Filed Jan. 22, 1910.

In District Court, January Term, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
P. & N. T. RY. CO.

Now comes plaintiff herein and excepts specially to the defendant's plea to the jurisdiction of this Court and says the same is wholly insufficient in law, because:

1st. Same is not sworn to as required by law.

2nd. Because as is shown by the allegations of said plea the defendant is a Texas Corporation and the allegations of said plea to the jurisdiction show that this Court has jurisdiction of the cause and of this plaintiff prays judgment of the Court.

COOPER & STANFORD,
Attorneys for the Plaintiff.

Filed January 22nd, 1910. Frank Wolflin, District Clerk.

21 *Order on Demurrers and Exceptions to Plea to Jurisdiction.*

January 22nd, 1910.

No. 1204.

M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

Order on Demurrers and Exceptions.

SATURDAY, January 22nd, 1910.

On this the 22nd day of January, 1910, came on to be heard the plaintiff's general demurrers and special exceptions to the special answer of the defendant filed herein, the same being sub-division No. 1, under paragraph 4, of defendant's original answer, and the Court having heard said general demurrers and special exceptions to the defendant's said special answer as set up in subdivision 1, of paragraph 4, of its original answer and considered same, is of the opinion that said general demurrer- and said special exceptions in all things should be sustained.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff's general demurrer and special exception to the special answer of the defendant filed herein as contained in subdivision 1 of paragraph 4, of its original answer, be, and the same is in all things sustained, to which action and ruling of the Court the defendant then and there in open Court duly excepted.

22 *L. C. Barrett Elected Special Judge.*

September 13, 1910.

Be it remembered, that on this the 13th day of September, 1910, the Honorable J. N. Browning, the regular Judge of this Court, being unwilling and unable to hold this Court and having vacated the bench and left the Court room the practicing lawyers of said Court and present thereat, to-wit: J. A. Stanford, W. O. Davis, L. C. Barrett, W. A. Davidson, Otis Trulove, S. H. Madden, C. B. Reeder, J. A. Graham, George W. Wharton, H. H. Cooper, Sam R. Merrill, A. A. Lumpkin, J. W. Crudginton, J. W. Veal, J. M Jones, Frank Ryburn, and J. N. Haney, proceeded to organize for the purpose of electing a special judge of this Court and selected L. C. Barrett as chairman, whereupon proclamation was made by the Sheriff of Potter County, Texas, at the Court House door that the election of a Special Judge of this Court by the practicing attorneys in attendance upon said Court was about to be made; the Clerk thereupon made a roll or list of all the practicing lawyers present, which roll or list is composed of the names above set out, whereupon said at-

torneys present and participating at said election proceeded to vote by ballot for special Judge, at which election sixteen ballots were polled, of which number eleven ballots were in favor of L. C. Barrett, two in favor of J. W. Crudgington, one in favor of W. A. Davidson, one in favor of J. A. Graham and one in favor of Sam
23 R. Merrill, said election therefore resulting in the election of said L. C. Barrett, as Special Judge, the oath of office prescribed by law was thereupon duly administered by the Clerk of this Court to the said L. C. Barrett, Esq., who then assumed the bench and proceeded to hold this Court as Special Judge, when the following proceedings were had, to-wit:

Oath of Office of L. C. Barrett, Special Judge.

Filed September 13th, 1910.

I, L. C. Barrett, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Special District Judge of 47th Judicial District of Texas, according to the best of my skill and ability, agreeably to the Constitution and Laws of the United States and of this State. And I do further solemnly swear that since the adoption of the Constitution of this State, I being a citizen of this State, have not fought a duel with deadly weapons within this state nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as a second, in carrying a Challenge, or aided, advised or assisted any person thus offending. And I further more solemnly swear that I have not, directly nor indirectly paid, offered, or promised to pay, contributed nor promised to contribute any money or valuable thing, or promises any public office or employment as a reward for the giving or withholding a vote at the election at
24 which I was elected (or if the office is one of appointment, to secure my appointment), so help me God.

(Signed) L. C. BARRETT.

Subscribed to and sworn before me, this the 13th day of September, 1910.

[SEAL.] FRANK WOLFLIN,
District Clerk Potter County, Texas,
By M. H. HARDIN, *Deputy.*

Filed September 13th, 1910. Frank Wolflin, District Clerk .

Order on Demurrers.

September 14th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.

WEDNESDAY, September 14th, 1910.

On this day came on regularly to be heard the defendant's general and first, second, and third special demurrers to plaintiffs' third amended petition, as such general and special demurrers are contained in defendant's amended answer, the Court having regularly heard and considered the same is of the opinion that the law is against said demurrers.

Therefore, it is ordered and adjudged by the Court that
25 defendant's said general and special demurrers each and all, be and the same are in all things overruled. To which judgment and action of this Court the defendant then and there in open Court duly excepted.

Defendant's Bill of Exception No. 1.

Filed October 5th, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.

That this bill is made and filed by the Court in lieu of one presented by defendant's counsel and refused.

Be it remembered that preliminary and prior to the trial of the above entitled cause the following proceedings were had, to-wit:

The regular District Judge of this Court, heretofore and prior to the convening of this term of Court and prior to the convening of the several preceeding terms of Court, announced regular standing rules of the District Court of Potter County, Texas, Seven in Number, being as follows, to-wit:

I.

Court shall convene on Monday morning of each week at 10 o'clock and 2 o'clock in the afternoon, all other days at 9 o'clock in the morning and 2 in the afternoon, unless otherwise ordered by the Court.

26

II.

Each Monday morning a sufficient number of cases will be called and set down for trial during the following week and no case will be set down for trial beyond the *the* week following the time it is set, except by agreement of the parties and with the consent of the Court.

III.

If a case which has been set down for trial be not tried, or otherwise disposed of during the week it is set for trial in, the same shall not be permitted to take precedence over other cases which are not set for trial during the week next following, but may be reset at the next setting day in the same manner as in the first instance.

IV.

After each setting of the case the Clerk shall prepare correct sets of the same, post one copy in his office, another in the Court room for the information of interested parties and deliver a third to the Court for his use.

V.

Demands for a jury in all cases must be made at or before the call of the appearance Docket on Tuesday of the First Week of the Term; and jury fees must be paid to the Clerk on the day the demand is made. No case shall be transferred to the Jury docket until after jury fee has been paid.

VI.

27 At the convening of the Court each day the Clerk will be required to read the minutes of the proceedings of the previous day, and to that end all orders and judgments obtained in civil cases must be promptly prepared by the attorneys of the successful party and submitted to the Court for approval before the same can be entered of record in the minutes.

VII.

The Civil and criminal Motion Dockets will be called on Saturday of each week at the afternoon session.

In pursuance of said rules, on Monday September 5th, 1910, the Court set down for hearing during the week beginning September 12th, 1910, the following cases, to be taken up and tried in order taken, as follows:

No. 1054 Ed Kirk vs. H. A. Nobles, et al.
No. 1063 Ed Kirk vs. Amarillo Street Railway Co.
No. 991 Joe H. Houston vs. H. A. Nobles, et al.
No. 1131 Anna Guernsey vs. Z. Z. Savage.
No. 1204 Mrs. M. A. Rosenbloom et al. vs. P. & N. T. Ry. Co.
No. 1271 E. P. Brown vs. The Pecos & Northern Texas Ry. Co.

On Monday September 12th, 1910, because another case was on trial, the regular judge of this court, Hon. J. N. Browning, proceeded with said cause for trial, which was concluded late Monday evening. On Tuesday morning, the 13th day of September 1910, the time of the Court through the forenoon and short time of the afternoon, the said J. N. Browning Presiding, was consumed in hearing motions on Motion Docket, postponed by special order of the Court from Saturday until Monday. After calling the motion docket and disposing of the motions said J. N. Browning,
28 regular Judge of this Court, vacated the bench and announced to the attorneys that he was unable and unwilling to further serve as Judge at that time and the attorneys should elect a special judge, after which Hon. Leonidas C. Barrett was regularly elected Special Judge, and after being duly qualified assumed the bench as special judge and proceeded to call said cases. Said cause No. 991 (Nos. 1054 and 1063, having already been disposed of) upon call was dismissed. The said Special Judge then called 1054 and 1063 in order, whereupon the attorneys representing said causes proceeded to announce to the Court in the order when said causes were called, that the same could be continued by agreement of parties and it was so ordered. Thereupon the Court called cause No. 1131, entitled Anna Guernsey versus Z. Z. Savage, Upon call thereof plaintiff's attorneys, who were also attorneys for defendant in cause No. 1204, announced that they were ready for trial, but that a compromise had been under discussion and asked the Court for a few minutes to consider the matter of the compromise, offered to announce to the Court so that the case would either be compromised and disposed of or tried and disposed of during the afternoon, as it was a short case. In consequence thereof there was a conversation and statements made by attorneys for both plaintiff and defendant, the substance being that plaintiff had made a proposition to compromise the Guernsey case by defendant paying plaintiff $1,250.00
29 and all costs and taking judgment for the property, and that defendants had accepted such proposition with the proviso that if it required all cash *they* might not be able to arrange it. C. B. Reeder suggested that such proposition had been made and accepted and all there was to do was to arrange a judgment but Mr. Graham suggested that the proposition had been made and that he had spoken to Mr. Savage about it and Mr. Savage was willing to accept the proposition but was now away and had stated that if it required all cash he might not be able to arrange it and that Savage was out of the City and *would could* not get back before tomorrow. Counsel for Anna Guernsey in said cause, also attorneys for defendant in this cause, stated that what they wanted was time to confer to see if that arrangement could be made, as they did not wish to lose a place on the docket but wanted to try it unless that arrangement could be made, so as to dispose of the case by compromise and requested time to take up that matter it being 4 P. M. and Mr. Madden wanted until Morning to look into it and see if a settlement could be made and further stated that they had preliminary work in the next cause which they desired to prepare and

present to the Court. The Court then found that case No. 1131, had been settled and announced that he would pass the case of Guernsey against Savage and call the Rosenbloom case for trial and go back to said case after trial of No. 1204, if No. 1131 was not settled, whereupon counsel for Anna Guernsey and for Pecos & Northern Texas Railway Company protested against such postponement of such cause of Guernsey against Savage and announced ready for trial in that cause and insisted that said case be taken up and not the case of Rosenbloom against the Railway Company, but the Court finding that this was only done to delay the Rosenbloom case postponed the said Guernsey on request of the defendant Savage's counsel proceeded to say that he could pass the case of Guernsey against Savage on motion of Savage's counsel and call the Rosenbloom case for trial and did so. Whereupon the plaintiff announced ready for trial and the Court proceeded to call on the defendant for an announcement. Defendant's counsel continuously and repeatedly objected and excepted, and now makes and presents this their bill of exception thereto and ask that the same be examined, approved and ordered filed as a part of the record in this cause.

Examined, approved and ordered filed.

L. C. BARRETT,
Special Judge.

Filed October 5th, 1910. Frank Wolflin, District Clerk.

Defendant's Bill of Exception No. 2.

Filed October 5th, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
PECOS & NORTHERN TEXAS RY. CO.

That this bill is prepared and filed by the Court in lieu of a bill presented by the defendant and refused by the Court.

Be it remembered that prior to and preceeding the trial of the above entitled and numbered cause the following proceedings were had affecting the rights of the parties and validity of said trial, to-wit:

The regular term of the District Court of Potter County, Texas, convened July 11th, 1910, during said term, thereafter to-wit, on the 25th day of July, 1910, the regular Judge of this Court, the Honorable J. N. Browning, was absent from Court when the practicing attorneys of the Court, present in attendance and desiring to dispose of business pending before the Court, proceeded in the man-

ner and form as prescribed by law to the election of a special Judge, when the Honorable W. M. Whitmire, practicing attorney of this bar, was duly elected and qualified as special judge to preside over the business and deliberations of the Court. He continued to act as such special judge during the week beginning with Monday, July 25th and ending Saturday, July 30, 1910, when he vacated the bench and failed and refused to longer act as special
32 judge. On Monday, August 1st, 1910, the regular judge of this Court, the Honorable J. N. Browning, had returned and assumed his position as Judge Presiding over the Court and continued so to preside until Tuesday, September 13th, 1910, until about 3:30 P. M. when he vacated the bench and refused to hold Court any longer announcing he was going to leave town. In the afternoon on Tuesday, September 13th, 1910, while presiding, the Hon. J. N. Browning announced from the bench that he desired to leave and make a trip for the purpose of placing his children in school and for that purpose intended to leave Amarillo on Wednesday evening, September 14th, 1910, on the train leaving Amarillo, at 6:35 P. M. and he did not wish at that time to be engaged in a trial or otherwise detained so he could not go. During the forenoon and a part of the afternoon of said day the said J. N. Browning presided and transacted the business of the Court, the principal part of which was to hear motions filed during the term and while he had been presiding at 3:30 P. M. of September 13th, 1910, the Hon. J. N. Browning completed the work of calling and disposing of the motion docket and as soon as concluded he made the remark that he, as before stated, would not proceed further with the business of the Court but would vacate the bench and let the bar elect a special judge. Thereupon he rose from his seat where he had been sitting and presiding as judge, and walked out of the Court room, after which the lawyers present proceeded to elect L. C. Barrett as special judge as shown by the record herein.

After being so elected the said L. C. Barrett as such special
33 Judge, proceeded to call and dispose of cases on the docket in their regular order and when he offered to call and was about to call this cause, and stated that he would call it for trial, defendant's counsel announced that they desired to enter a protest against his presiding and defendant made an oral motion for him to vacate the bench stating that he was not legally and regularly elected and was not authorized to sit and asked for time to make such motion and protest *to* writing, which was by such special judge overruled and refused, defendant's counsel refusing to state orally the grounds of his objection and protest, the defendant's counsel then and there excepting. The defendant's counsel then and there requested time to file a bill of exception, excepting to such action of the Court refusing to give him time to prepare bill of exception and to enter his protest and exception of record, which time by the Court was refused, Counsel still refusing to state same verbally the defendant again excepting. After such proceeding the Court proceeded to call said cause and requested the defendant's counsel to announce and the defendant's counsel asked time to prepare a motion

for continuance or postponement which was granted and defendant's counsel took about forty minutes to dictate such motion and take other proceedings in said cause during the afternoon of the 13th the Court proceeded to order veniremen to fill up the panel and call the jury and required the counsel for the defendant with the plaintiff's counsel, to question, qualify and select a jury
34 for the trial of this cause, with the agreement with defendant's counsel that he could present his motion the next morning the court remarking that if it was good he would grant it, after which the Court adjourned until 8:45 A. M. on the morning of the 14th.

At the convening of the Court on the morning of the 14th the defendant's counsel remarked that he had his witnesses and did not desire to press his motion for continuance or postponement but again protests and objects to the said L. C. Barrett, proceeding to sit as Special Judge and said that the said J. N. Browning is not absent from the City and not disabled or disqualified from presiding but is yet in Amarillo and in and about the Court Hous*t* but not in the Court room but in town attending to a private business and is not absent from the City or from the County and does not intend to be absent until 6:35 P. M. of this the 14th day of September, 1910, when he expects to start away on the Southbound Denver train; and further objects and protests because the said L. C. Barrett was not regularly, duly and legally elected after proclamation made in the manner and form as prescribed by law and after notice given by the working members of the bar as provided by law; and further objects because the said W. M. Whitmire has already been elected special Judge to preside over deliberations of the Court for the present term during the absence of the regular Judge and the said W. M. Whitmire, as well as the Hon. J. N. Browning, the regular Judge of this Court, is present in town and not incapacitated, dis-
35 qualified or in any manner refusing to act as Special Judge, and in the absence of a resignation on his part as special judge or failure or refusal upon his part to act, there is no authority in law for the election of a second special judge to preside over the deliberations of this Court.

The said Hon. L. C. Barrett then and there again overruled each and all of said special objections and protests, and proceeded over such objections and protests to try and dispose of this cause, to which proceedings and actions of the said special judge the defendants in open Court duly excepted and *objecting* to each and all of the proceedings herein recited, and they now here prepare their bill of exception thereto and ask that the same be examined, approved and ordered filed as a part of the records herein.

Examined, approved and ordered filed.

L. C. BARRETT,
Special Judge.

Filed October 5th, 1910. Frank Wolflin, District Clerk.

36 *Defendant's Bill of Exception No. 3.*

Filed October 22nd, 1910.

This Bill is Refused by the Court.

In the District Court of Potter County, Texas, 47th Judicial District.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Ry. Co.

Be it remembered that preliminary and prior to the trial of the above entitled and numbered cause, the following proceedings were had, to-wit:

The regular judge of this Court, on the thirteenth day of September, A. D. 1910, vacated the bench after having stated to the lawyers present that he was making his calculations to leave the evening of the next day, on the train leaving Amarillo at 6:35 P. M. to take his children and put them in School at Belton, Texas, and that he did not wish to take up, and would not take up any case that would hold him beyond that time, and that inasmuch as he needed some time to get ready for the trip, he would vacate the bench and the lawyers might, if they saw fit, proceed to elect a special Judge to hold Court and further dispose of business for them. The regular judge had vacated the Bench in pursuance to such announcement and L. C. Barrett was selected as special Judge and proceeded to call the cases.

When he called the above case for trial and before any an-
7 nouncement, defendant's counsel stated to the Court as follows:

"I want time to make a motion and want time to prepare it and reduce it to writing. I want to move that your Honor vacate the bench on the ground that you have not been elected according to law and properly assumed the bench to try this cause; there was no proclamation made at the time and in the manner and at the place as required by law, or if any proclamation was made the ba-liff attending the Court just hallooed out at the window in the Second Story of the Court House, there to the west of the Judge's stand, and it was not made at the fron- door of the Court House in the manner as prescribed by law, and you, the Judge sitting on the Bench, have not qualified according to law to sit and try this case. And there was not a full attendance of the bar at your election.

When such statement was made the Court stated:

"Well, I will overrule that motion." And counsel for the defendant then stated: "I want time to put — in writing and present it here," which the Court refused. Defendant's counsel then further stated: "I want to take a bill of exceptions to your Honor refusing me time to put that motion in writing. I want time not only to put the

motion in writing and have it filed, and set up all the facts, and setting up that we have sought to get this matter of record; and the Court refused to grant us time, and overruled the request for time to file their motion in writing or to reduce the bill of exception
38 to writing and have it approved and filed, and required the defendant's counsel to proceed with presenting the demurrers. After so refusing defendant's counsel time to prepare such bill of exceptions requiring him to submit the demurrers which were all overruled, *and* then called upon counsel for the defendant to announce. Defendant's counsel was not ready to announce, stating their reasons that the witnesses had been called but would not all be here before next morning; that this case had been advanced over the case of Guernsey against Savage, so the witnesses were not present, and that he could not tell whether they would be present before the next morning, and asked for time to prepare an application for postponement or continuance, after which the Court ruled that he would proceed and empanel the jury and hear the application for continuance or postponement the next morning. When Court convened on the morning of the fourteenth of September, Court was opened by the proclamation of the bailiff and forthwith, without calling for any announcement or presentation of application for continuance or postponement, the Court remarked to plaintiff's counsel by saying: "Gentlemen, proceed," and thereupon H. H. Cooper, attorney for plaintiff's counsel begun to read plaintiff's petition to the jury. As soon as he was through reading the defendant's counsel addressed the Court as follows:

We desire to renew our objection of yesterday before proceeding, and we desire to renew our objections to your Honor sitting as Special Judge in the trial of this case and desire to detail our objec-
39 tions. We did not get time and opportunity on yesterday to detail our objections nor put them of record before the Court. Now, we wish to state to the Court that we have dictated a bill of exceptions this morning and we will have it over here pretty soon. It is being written by the Stenographer now. And we now object to this proceeding here and to this Court presiding and proceeding with the case as Special Judge; First: Because the regular judge is neither absent nor disqualified, but simply at the time the special judge was elected, had stated that he intended to leave this afternoon (it was *tomorrow* afternoon when he was talking), and so stand in the forenoon of yesterday when he was calling the motion docket and hearing motions, and stated he would be absent because he desired to leave town, and said he would not hold Court after the motion docket was called and concluded; and after he called the motion docket and disposed of the motions thereon and just before the proceedings were had to elect a Special Judge he stated: "I told you I was not going to hold Court any further and will now get out and let the attorneys elect a special judge" and he walked across the hall separating the Court room from his office and was in his office in the same building at the time the election was had. And then we want to object to this proceeding further because a Special Judge was elected at a former day of this term of Court, to-wit, on the 25th day of July, 1910, hold-

ing Court from that day until Saturday, July 30th 1910, during the present term of this Court, and Mr. Whitmire, said Special
40 Judge elected prior hereto, is also in town and is available and has not resigned, nor is he in any manner disqualified from proceeding to hold this Court. We want further to object to the regularity of this proceeding, because there was no proclamation made in the manner and form as is required by law of the election. Such proclamation was not made at the Court House door by the Sheriff or Constable, and in fact many of the bar did not hear any proclamation at all, and but one or two heard it from the window there west of the Judge's stand, where the bailiff attending the Court said in an audible voice, but not loud enough to be heard well in here in the room even, but not loud enough to be heard beyond the confines of the Court room, and he said: "Oh yes, Oh yes, the Bar is now about to elect a Special Judge." Mr. Wharton, one of the attorneys attendant upon this Court, has the proclamation of record and it can be obtained from him, and I take it literally from what Mr. Wharton gave me.

We desire now to renew these objections and to further specify that Mr. Browning, the regular Judge of this Court as before mentioned, is in the City of Amarillo, though not present at this time in the Court room, and he has not left the City or the County or the State, and Mr. Whitmire, the Special Judge before elected, is in his office in the National Bank of Commerce Building, just — a streets and two blocks away at this time.

The Court then asked if Mr. Browning or Mr. Whitmire wanted to hold this Court, and being answered by counsel for defend-
41 ant that he didn't know, the Court then says: "All right, I will overrule the motion."

Thereupon the counsel for the defendant asked time and leave to have the bill completed and brought over and filed and made a part of the record in this cause before proceeding further, and the Court overruled the objection and request for time and required the defendant's counsel to proceed with the reading of their pleadings, to the jury and offering testimony in the case.

The defendant further notes, and asks to be put in the record that the bill of exceptions was brought over, subsequent thereto, it was delivered to the Court, together with another bill, which have since by the Court been turned over to counsel for plaintiffs, and plaintiffs' counsel so mutilated the bills that the Court required them to re-write them, and the bills have been re-written by plaintiff's counsel, or some other person unknown to this defendant, and marked refused by the Court, L. C. Barrett as Special Judge, and as re-written and refused are filed in the records of this case and such refused bills appear in the records as number- one and two.

To all of which proceedings the defendant's counsel then and there excepted and now here makes and tenders this its bill of exceptions thereto and asks that the same be examined, approved and ordered filed as a part of the records herein.

MADDEN, TRULOVE & KIMBROUGH,
Attorneys for Defendant.

42 Defendant's bill of exception No. 3 is refused in toto, because it is wholly incorrect and is in substance the same as defendant's Bill of exception No. 1, which has already been refused by the Court as incorrect and for which bill the Court has already filed a substitute bill of exception, the same being Bill No. 1.

L. C. BARRETT,
Special Judge.

Filed October 22nd, 1910. Frank Wolflin, District Clerk.

Defendant's Bill of Exception No. 4.

Filed October 22nd, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Ry. Co.

Be it remembered that upon the trial of the above entitled and numbered cause, the following proceedings were had, to-wit:

The plaintiff introduced Jasper N. Haney, Jr., and examined him at length on direct examination, and during the course of his direct examination he testified, in substance, that he hallooed
43 at the deceased, M. A. Rosenbloom, when the deceased was about four or five car lengths from him; that he gave the engineer the slow-up signal which the engineer did not observe, etc.

Afterwards while the defendant's counsel was cross examining the witness and desiring to have him state whether or nor he had given the slow up signal about 50 feet from Rosenbloom and that he had hal-ooed when he was about that distance from him, and then to confront him with his former written statement to the Company in which he had stated that when he was about 50 feet from Rosenbloom, he saw Rosenbloom ahead and hal-ooed at him to look out, and gave the engineer the slow-up signal and that the engineer slowed down the train and as a predicate for introducing such statement of the witness began to interrogate the witness about it, when the following questions were propounded and answers given, to-wit:

"Q. How many times did you halloo at him?"

"A. One time."

"Q. You were then just about fifty feet from him, a little over a car length?"

"A. No, Sir, it was as I stated."

At this point the Court interrupted and said "Just answer the question now," after which the witness made the following additional answer.

"A. I don't think I hallooed at him at that time. If I hallooed at him within fifty feet I don't remember it. Then the defendant sought to further refresh the memory of the witness and add to the question, and began asking the following questions:

44 "Q. Didn't you halloo at him when you were within about fifty feet of Rosenbloom, and did you not then signal the engineer to slow down?, when the Court interrupted before the latter part of the question was added, and says to the counsel interrogating the witness: "You have asked that question and he has answered it. Don't ask that question any more", in an abrupt authoritative manner, and in answer to which counsel for defendant replied: "I insist that the Court permit me to ask my question and get it of record and then the Court can rule on it." To which the Court replied: "You have asked that question once or twice. Go ahead and let's get through with the witness", to which counsel for the defendant replied: "If the Court will let me use the time that your Honor is using and the counsel for plaintiff uses in objecting and the time we must use in taking exceptions, I will soon finish with the witness," to which the Court replied: "Well, you asked him that question already. Ask him something else. He has answered that two or three times."

After which counsel for the defendant proceed- with the witness as follows:

"Q. I want to know how far you were away from him when you hallooed. I want to know that, and also whether or not at the time you hallooed at him you gave the slow-up signal, but the Court interrupted me before I got the question out. I want to put the question again, and add these further words: Didn't you halloo at him about fifty feet away and give the engineer at the same time the slow-up signal."

45 After which the Court says: "You can answer that question," and to which interruption counsel for defendant replied: "We, object and take a bill of exceptions. I think the Court ought to let us examine the witness without so many interruptions." To which the Court replied: "I said you could ask that question." After which counsel for the defendant continued as follows:

"Q. Didn't you halloo at him about fifty feet away and at the same time give the engineer the slow-up signal?"

"A. I didn't halloo at him but one time.

"Q. Answer my question.

"A. I thought that answered it.

"Court: Did you give the signal when you hallowed at him?"

"A. I stated that I gave a signal to the engineer within four or five car lengths of Mr. Rosenbloom."

"Court: Did you give a signal within fifty feet from him?"

"A. No, sir, I don't remember giving the signal then.

Counsel for defendant: "Didn't the engineer at the time you gave the slow-up signal slow down?

"A. No, sir."

* * * * * * *

And further on during the same examination of the witness, the following proceedings were had, to-wit:

"Q. Didn't he (the engineer) immediately after, or about the time you gave the slow-down signal give four blasts of the whistle?"

46 "A. He did in fifteen or twenty feet of the man we hit."

"Q. Didn't he give it before that time?"

"A. I don't think so. If he gave it before I did not hear it. I cannot testify about that."

"Q. Is it not a fact now, that you saw Mr. Rosenbloom when you hallooed at him, when you were about 50 feet away, and didn't he immediately step towards track five coming from over against the moving train on track number four, and start diagonally across track five in front of the ballast car."

At this point the Court interrupted and says: "You need not answer that question at all, as to whether you hallooed at him within fifty feet." To which interruption by the Court Counsel for the defendant excepted and objected to all the proceedings of the Court in interrupting the witness and commenting, because it was upon the weight of the testimony. Then counsel for defendant proceeded further and said:

"Now as a part of that same question: Is it not a fact that you were at that time slowing down to couple on the coal cars in front of you?

"A. It is a fact, in my judgment that the speed was not decreased any."

"Q. Why do you evade my question and answers with an argumentative proposition?"

"Court: I don't think he evaded it Mr. Madden."

To which remark of the Court counsel for defendant says:

47 "I will take a bill of exceptions to the remark of the Court. It is an undue interruption and a comment upon the weight of the testimony. To which the Court replied: "All right. Go ahead."

After which counsel for defendant called for the Stenographer to read the question, and the Stenographer read the last part of the last question, and the Court then remarked: "He has answered it. Go ahead with the witness."

To which proceedings the defendant's counsel then and there excepted and asked time to prepare and file a bill of exceptions, and the Court then and there refused to grant the time requested by counsel for defendant, in which to prepare and have approved and filed at that time the bill of exception, and says: "You already have your bill. It is in the record." to which defendant's counsel replied: "Now we demand the time for it to be reduced to writing:—to prepare the bill of exceptions and reduce it to writing, have it approved and put of record, and if the Court will not give us that time, we take a bill of exception to his refusing to give us the time to have it prepared and filed now." The court then and there refused the request of counsel for the defendant for time to prepare a bill and have it approved and placed of record, and says: "You will have everything that is in the record in your bill." After which counsel for defendant asked: "Will the Court let the Stenographer read the question

so I can make the connection." To which the Court answered: "Yes, I will permit that but hurry up and don't ask the same question over and over again."

48 To which proceeding the defendant then and there excepted and then called upon the Stenographer to read the question and proceeded with the examination of the witness further, and defendant now here makes and tenders this its bill of exception, after the adjournment of the Court and within the time allowed by the order of the Court, and asks that the same be examined, approved and ordered filed as a part of the record herein.

MADDEN, TRULOVE & KIMBROUGH,
Attorneys for Defendant.

(This bill continued on next page.)

Defendant's Bill of exception No. 4, is incorrect and does not reflect the true state of the record, and as a qualification of said bill the Court attaches hereto a true and correct copy of the Stenographer's report covering the matters complained of which contains the facts in accordance with the memory of the Court. After the witness J. N. Haney, Jr., had stated in answer to questions propounded to him by plaintiff's counsel that he hollowed at M. A. Rosenbloom one time and that he was then four or five car lengths from the said M. A. Rosenbloom. On cross examination of the said Haney by defendant's counsel, the following occurred.

"Q. Now, you say you hallowed at Mr. Rosenbloom when you were about,—how far from him did you say?

A. Four or five car lengths.

49 Q. You hallowed at him when you were four or five car lengths away? Didn't you halloo at him when you were about fifty feet away?

A. I don't remember having hallooed at him then.

Q. Will you say that you did not halloo at him within that distance?

A. My recollection is that it was four or five car lengths.

Q. How many times did you haloo at him?

A. One time.

Q. You were then about fifty feet from him, a little over a car length?

A. No sir I was as I stated.

Court: Just answer the question now.

A. I don't think I hallooed at him at that time. If I hallooed at him within fifty feet, I don't remember it.

Q. Didn't you halloo at him when you were about fifty feet away?

Court: You have asked that question and he has answered it, don't ask that question any more.

Mr. Madden: I insist that the Court permit me to ask my questions and get it of record and then the Court can rule on it?

Court: Have you asked that question once or twice. Let's get through with the witness.

Mr. Madden: If the Court will let me use the time that he uses in taking exceptions in examining the witness, I will finish with him.

Court: Well you ask- him that question already, ask him
50 something else. He has answered that two or three times.
Mr. Madden: I want to know how far you were away from him when you hallooed? I wanted to know that but the Court interrupted me before I got the question out. I want to put the question and to add these further words. Didn't you halloo at him about fifty feet away and give a signal to the engineer at the same time?
Court: You can ask that question:
Mr. Madden: We object and take out bill of exceptions. I think the Court ought to let us examine the witness.
Court: I said you could ask him that question.

Madden: Didn't you halloo at him about fifty feet away and at the same time give the engineer a slow-up signal?
A. I did not halloo at him but one time.
Q. Answer my question?
A. I thought that answered it.
Court: Did you give the signal when you hallooed at him?
A. I stated that I gave the signal to the engineer within about four or five car lengths of Mr. Rosenbloom?
Court: Did you give a signal within fifty feet from him?
A. No, sir, I don't remember giving a signal then.
Mr. Madden: Didn't you at the time, didn't the engineer at the time you gave the slow-up signal slow down?
A. No sir.
51 Q. Did Mr. Rosenbloom at the time you hallooed at him move over next to the train or track No. four?
A. If you want me to detail that, he first walked near the moving train on track four and that led me to believe that he knew that we were approaching and then he moved near the center between the two tracks, that is my recollection of the matter, and then he started across the track and got caught.
Q. Now did he move near to the passing train before you halloed or after you halloed?
A. It was after I hallooed. As I have stated he was moving near the moving train and then when he seemed to be near track No. four I hallooed and gave the slow-up signal.
Q. When he came near to Four you hallooed and gave the slow-up signal?
A. Yes, sir.
Q. Didn't he move nearer track four immediately after you hallooed?
A. I don't think he did.
Q. Sir?
A. I don't think he did. I don't remember his having moved in either direction to lead me to believe why he was going.
Q. Was not the train moving more than four or five miles an hour prior to the signal, that is, the engine and the ballast car?
A. How is that?
52 Q. Was not the engine and the ballast car moving more than four or five miles an hour?

A. Why I don't know exactly, It was moving faster than that, I think, not much faster.

Q. Didn't the engine slow down to four or five miles when you gave the slow down signal?

A. I have already answered that if he slowed down that I could not detect it.

Q. Didn't he immediately after or about the time you gave the slow down signal, give four blasts of the whistle?

A. He did in 15 or 20 feet of the man we hit.

Q. He never gave it before that time?

A. I don't think so, if he gave it before I did not hear it. I cannot testify about that.

Q. Now how did Mr. Rosenbloom move to get on the track. I will change that question. Just rub that out Mr. Mood. Is it not a fact now that you say Mr. Rosenbloom when you hallooed at him, when you were about fifty feet away and didn't he immediately step towards the track four, that is, over against the moving train?

Court: You need not answer that question as to whether you hallooed at him within fifty feet.

Mr. Madden: Note our exceptions.

Mr. Madden: Now as a part of that same question, is it not a fact that you were at that time slowing down to couple on to these cars?

A. It is a fact in my judgment that the speed was not decreasing any.

53 Q. Why do you evade my question and answer that argumentative proposition?

Court: I don't think he evaded it Mr. Madden.

Mr. Madden: I take an exception to the remarks of the Court.

Court: All right, go ahead.

Mr. Madden: Read him the question.

Stenographer: "Now as a part of that same question: Is it not a fact that you were at that time slowing down to couple on to these cars?"

The Court: He has answered it go ahead with the witness.

Mr. Madden: I will ask for time to prepare a bill of exception on that.

Court: You already have your bill, it is in the record.

Mr. Madden: Now we demand time for it to be reduced to writing and put it of record, and if the Court will not give us the time, we take a bill of exception to that.

Court: You will have everything that is in the record in your bill.

Mr. Madden: Will the Court let the Stenographer read the question so I can make the connection?

Court: Yes, I will permit that, but hurry up and don't ask the same questions over and over again.

L. C. BARRETT,
Special Judge.

Filed October 22nd, 1910. Frank Wolflin, District Clerk.

54 *Defendant's Bill of Exception No. 5.*

Filed October 22nd, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Ry. Co.

Be it remembered that on the trial of the above entitled and numbered cause, the following proceedings were had to-wit:

The plaintiffs introduced Jasper N. Haney, Jr., as a witness for the plaintiff- and he was examined and cross examined and excused from the stand but held under the rule subject to the further call. Later on the defendant's counsel asked permission to recall said Haney for further cross examination; and in compliance with said request he was called and further cross examined by the defendant's counsel with reference to matters in conversation occurring between said Haney and Charles E. Fullington, and with reference to what defendant's counsel considered to be contradictory statements between his written statement to the Company and his testimony as given in his direct examination when first called by the plaintiff. Upon completion of such further questioning by counsel for defendant, he was interrogated by plaintiffs' counsel, being asked questions and making answers thereto, as follows, to-wit:

"Q. Is it not true Mr. Haney, that at the time Charles Fullington came to the office you introduced him to me?"

55 "A. Yes, sir, I introduced him to Judge Stanford."

"Q. And didn't I ask him to state the facts?"

"A. Yes, sir, that is a fact."

"Q. And I never a minute suggested to him that I wanted him to tell me anything else."

"—. I never saw you suggest by sign or any other way that I know of."

"Q. Is it not a fact that on last Tuesday night I requested you to go with me up to Charles Fullington's house and talk to him again?"

"A. That is a fact."

"Q. And one reason was because you knew where he lived and I did not?"

"A. Yes, sir.

"Q. Is it not a fact that we all sat down in the moonshine on the front gallery and we simply went over this case and talked about it, and I asked Charles Fullington whether or not he was willing to make a statement to me and have it reduced to writing?"

"A. That is a fact."

"Q. And he replied he had already made a statement to the Company and he would not make any further written statement."

"A. Yes, sir, to either side, I believe he said."

"Q. Is it not true that I never suggested or intimated to him on that occasion that I wanted him to state anything else except what the actual facts were surrounding the killing?"

"A. That is a fact."

56 "Q. Now, Mr. Haney, I will ask you to state if it is not true that on the day of this killing of Rosenbloom, that engineer Walker remarked in your presence that: "When I saw Rosenbloom go out of my sight I remarked to my fireman, we have killed that damned little Jew."

"A. I am not positive whether it was the next day after the accident, or two days or three days after, but I remember being on the engine and *and* heard him make some such remark. I can't say exactly when it was."

At the time each and all of said questions were asked the defendant objected thereto, because same were leading, and the Court overruled said objections urged by counsel for defendant that the questions were leading, and permitted the witness to answer, as above indicated.

When said question above quoted as to the remark made by the engineer, was asked the defendant's counsel offered the objection to it that it was leading and because it was irrelevant, immaterial and incompetent and that it had been shown that no such remark was made, and because the Company was not responsible for such remark, if made. The Court overruled the objections and permitted the witness to answer, but after the witness had answered indicating that he was not certain about the matter, Mr. Stanford, Counsel for plaintiffs, says to the witness: "Wait just a minute. If you are not positive as to it we will not insist on the answer." After Counsel had so stated the Court remarked that he believed he would sustain the objection made, after which Mr. Stanford Plaintiffs' counsel remarked to the Court as follows: "The predicate I laid was

57 for specific statement. I asked if he didn't make this statement on the day of the killing and this witness says that he does not know whether it was that day or a later day." Then counsel for defendant remarked that it was not objected to because the predicate was not laid—that that was not the objection. Counsel for plaintiffs, Mr. Stanford, then stated: "I withdraw the question," and the Court said: "I will overrule the objection," after which counsel for defendant said that they objected to the proceeding of asking a question, and having objections thereto made and having them overruled, getting the answer before the jury and then attempting to withdraw it so as to destroy the effect of an erroneous ruling, and claim the right to have a bill of exceptions to the entire proceeding. Defendant's counsel then insisted that such proceedings of asking questions and getting answers before the jury over the defendant's objections, and then attempting to withdraw them, was unfair, improper and prejudicial, and was a matter of getting improper matter before the jury and into the minds of the jury to the prejudice of the defendant which could not be eradicated by the mere statement of

the Court that he would not permit counsel for plaintiffs to withdraw the question.

Defendant's counsel then and there objected to all of such questions, and to such other proceedings as above stated, and excepted to the ruling of the Court, and now here makes and tenders this its bill of exceptions thereto and asks that the same be examined, ap-
58 proved and ordered filed as a part of the record herein.

MADDEN, TRULOVE & KIMBROUGH,
Attorneys for Defendant.

Defendant's Bill of Exception No. 5 is wholly incorrect and erroneous in that the record wholly fails to show that defendant's counsel recalled the witness, J. N. Haney, Jr., for further cross examination, but shows simply that the witness, J. N. Haney, Jr., was called in behalf of the defendant and was examined as defendant's witness. Said bill is wholly erroneous in the latter part of this bill in that the witness never answered to question as to whether or not he heard the engineer make a remark to the effect that he had killed a damned Jew, he, the witness state- that he did not remember about it, and the Court sustained the defendant's objection to this question and the witness never at any time answered any such question. And it is a further fact that defendant had introduced evidence attempting to show that plaintiffs' counsel had at the time and interview of Fullington stated in this bill and through Haney had tried to lead Fullington to believe if he would testify as the plaintiffs' counsel desired he, Fullington, would probably get something out of it, and this was done by defendant in examination in chief of both witnesses Fullington and Haney, and these qualifications and answers on cross examination as set out in this bill were allowed.

L. C. BARRETT,
Special District Judge.

Filed Oct. 22nd, 1910. Frank Wolflin, District Clerk.

59 *Defendant's Bill of Exception No. 6.*

Filed October 22nd, 1910.

In the District Court of Potter County Texas, 47th Judicial District.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.

Be it remembered, that on the trial of the above entitled and numbered cause, the following proceedings were had, to-wit:

Plaintiffs' counsel introduced as a witness M. Briles, and Pat Steward, and sought to prove by them as expert witnesses that an engine with a tender and an empty ballast car annexed, on a level track like

that where the accident in question happened, could be stopped in a shorter distance that the distance of about sixty feet, shown by the testimony to have been the distance the ballast car moved after striking Rosenbloom, or in about twelve feet. And also offered to prove on cross examination of the witness J. L. Walker, a witness introduced by the defendant, the same fact, and defendant's counsel then and there objected to such testimony for the following reasons, to-wit: That it is incompetent, irrelevant and immaterial, and there is no allegation of negligence upon the failure of the engineer to stop within the limit of space that the engine could have been stopped,
60 under the conditions, and the Court then and there overruled such objections and permitted the said Briles and the said Stewart to testify that the engine could have been stopped within about twelve feet, and permitted them to prove by the witness Walker that under certain conditions they could have stopped within a less distance that the *the* distance moved by the engine and the ballast car after striking Rosenbloom. To which ruling and proceedings of the Court, the defendant then and there excepted, and now here makes and tenders this *their* bill of exceptions and asks that the same be examined, approved and ordered filed as a part of the record herein.

MADDEN, TRULOVE & KIMBROUGH,
Attorneys for Defendant.

Appellant's bill of exception No. 6, is approved with the following correction:

Plaintiffs' counsel introduced M. Briles and Pat Stewart, and after said witnesses had duly qualified as experts, sought to prove by them as expert witnesses within what space an engine with a tender and an empty ballast car annexed, backing on a level track like that where the accident in question occurred, and moving at the rate of about five miles an hour and equipped with same character of brakes as the engine and tender in question could be stopped, to which question the defendant objected on the ground that it was incompetent, irrelevant and immaterial and that there was no allegation in the petition
61 to authorize such testimony, which objections the Court overruled and said witnesses answered that the engine and ballast car could have been stopped within from five to eight feet. With this correction, the above bill is approved.

L. C. BARRETT,
Special Judge.

Filed October 22nd 1910, Frank Wolflin, District Clerk.

PP. 119-122, Stenographer's report.

Defendant's Bill of Exception No. 7.

Filed October 22nd, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.

Be it remembered that on the trial of the above entitled and numbered cause, the following proceedings were had, to-wit:

After the witness, J. L. Walker, for the defendant, had been examined in chief and turned over to counsel for plaintiffs for cross examination, the following questions were asked, and answers given, and interruptions made by the Court, and objections taken thereto, as follows:

62 "Q. Now, Mr. Walker, do you mean to tell this jury that you did not know if you pushed that ballast car down there by the side of that moving train and run upon Mr. Rosenbloom in the narrow space between these running trains on the tracks, that he would not be placed in great danger?

A. Why there ain't no danger if a man stays out of the way.

"Q. But, if you ran on him unexpectedly—to be unexpectedly placed between two moving trains in that narrow space, is that not a great dangerous predicament."

"A. But I didn't run on him unexpectedly. I blew the whistle at him and he looked around."

"Q. I understand that you say you did, but didn't you understand that if you ran onto him without his knowing it—without his knowing that you were coming, and that you came up unexpectedly upon him and placed him between those two moving trains, don't you know, and didn't you know that he was liable to become confused?"

A. But he knew that I was coming."

Counsel for plaintiff- then addressed the Court and says: "I would like for the witness to answer my question."

Court: I don't believe the witness understands the question. He asked you, Mr. Walker, if you didn't know that it was liable to confuse Mr. Rosenbloom, if you ran the ballast car and engine down there on track five by the side of the moving train on track four and he was not expecting it."

63 To which question and answer and interruption of the Court the defendant's counsel then and there excepted, and objected to the whole proceeding for the following reasons, to-wit:

Because the witness has made true answers to the questions, answering them intelligently, honestly and fairly, and the question as stated is hypothecated upon a state of facts that did not exist, and asked for the opinion and conclusion of the witness, and is an argument with the witness.

The Court then and there overruled such objection and directed plaintiffs' counsel to proceed, after which the following proceedings were had:

Plaintiff's counsel: I will put the question to him again."

The Court interrupts and says: "Mr. Walker do you understand the question you are asked?"

After which the witness answered: "Well, if I had went down on him without warning him then he would have been in danger," and the defendant's counsel then and there objected to such proceedings, as above stated, and took an exception thereto, and defendant now here makes and tenders this its bill of exception to such proceedings and asks that the same be examined, approved and ordered filed as a part of the record herein.

MADDEN, TRULOVE & KIMBROUGH,
Attorneys for Defendant.

64 Defendant's Bill of exception No. 7, is correct except the grounds of objection complained of in the bill are not correctly stated. The only grounds of objection and questions asked by the Court complained of in this bill were as follows: "We object to the Court asking him any further questions and we object to the whole proceeding, he, counsel for defendant, places a question to the witness and the witness answers it intelligently honestly and fairly and then he complains and the Court undertakes to get a further answer out of him." And because there is nothing in the record on which to base the question. These are the grounds of objections and the only grounds of objection made by counsel for the appellant in the Court below to the evidence and to the questions asked by the Court complained of in this bill, and with this correction I approve said bill of exceptions and order that the same be filed as a part of the record in this cause.

L. C. BARRETT,
Special District Judge.

Filed October 22nd, 1910. Frank Wolflin, District Clerk.

65 *Defendant's Bill of Exception No. 8, Refused.*

Filed October 22nd, 1910.

(This Bill of Exception is Refused by the Court.)

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

Be it remembered that on the trial of the above entitled and numbered cause, the following proceedings were had, to-wit:

The defendant introduced the witness B. B. BOLLINGER, as a witness for defendant and after examining him in chief, turned him over to plaintiffs' counsel for cross examination, and during the course of such cross examination the plaintiffs' counsel asked him the following questions:

"Q. Mr. Bollinger, is it not true that just as you ran over Mr. Rosenbloom, or about the time you ran over him, the fireman or the engineer said: "We have run over and killed the damned little Jew?"

To which question and proposed answer defendant's counsel then and there excepted because it is irrelevant, incompetent and immaterial, and calculated to prejudice the minds of the jury against the defendant. The Court then and there overruled said objection of the defendant's counsel and permitted the counsel for plaintiffs to ask said question and the witness to make answer thereto as fol-
66 lows: "No, Sir, there was no such expression used around there."

Later on, after the witness had been further examined on re-direct examination, the plaintiffs' counsel again took him on re-cross examination, and during the course of such re-cross examination the following proceedings were had, to-wit:

"Q. What did the engineer say to you just as you ran over Mr. Rosenbloom?"

To which question and proposed answer of the witness, the defendant's counsel objected, and the Court overruled the objection so urged and permitted the question to be asked and the witness to make the answer: "I think I asked him what was the matter—why we stopped, and he answered "we have run over and killed that Jew."

"Q. Is it not a fact that he said: "We have killed that damned Jew?"

To which counsel for defendant objected as before; and the Court overruled the objection and permitted the answer:

"A. No, he didn't say that."

* * * * * * *

Later on the defendant introduced the witness DAVE THOMAS, and on cross examination by counsel for plaintiffs they asked him the leading question if it was not a fact that the engineer or fireman, or someone, said there at the time that "We have run over and killed that damned little Jew."

And likewise again when the witness C. E. FULLINGTON, a witness introduced by defendant, was on the stand, counsel *of*
67 plaintiffs, on cross examination, asked him the same leading question and in the same form, and on each occasion the defendant's counsel objected to it for the same reason as stated in the first objection, and further objected because it had been shown that no such expression was used, and that the plaintiffs' counsel was merely asking the questions merely to prejudice the minds of the jury against the defendant Company, when they knew that if such an expression were used it was irrelevant and immaterial testimony, and it was offered purely for the purpose of prejudicing the rights of the defendant before the jury, but the court overruled the objections each time and permitted the testimony to go to the jury, the witness in each instance testifying that they heard no such expression.

And again when the plaintiffs' witness, JASPER N. HANEY, JR., was called by the defendant for further examination, the plaintiff proceeded to further interrogate him and ask him similar questions, over similar objections urged by defendant, and got similar replies from the witness.

Defendant's counsel in each instance excepted to the acts of the Court and the conduct of counsel for plaintiffs in interrogating the witness, and now here makes and tenders this its bill of exceptions thereto and asks that the same be examined, approved and ordered filed as a part of the record herein.

MADDEN, TRULOVE & KIMBROUGH,
Attorneys for Defendant.

68 Examined and disallowed and I file bill in lieu hereof stating the facts.

L. C. BARRETT,
Special Judge Presiding.

Filed October 22nd, 1910. Frank Wolflin, District Clerk.

The Court's Bill of Exception No. 8 in Lieu of Defendant's Bill of Exception No. 8.

Filed October 22nd, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Ry. Co.

The defendant's bill of exception No. 8, is incorrect and is not sustained by the record and I hereby make the following statement in lieu of said — No. 8, of what did occur as shown by the record and Stenographer's report as well as my memory: Plaintiffs' counsel asked the witness Bollinger, the following question, "What did the engineer say to you just as he ran over Mr. Rosenbloom?" And the witness answered without objection that the engineer said "We have run over and killed that Jew." Plaintiffs' counsel then pro-
69 pounded the following question, "Is it not a fact he said we have killed that damned Jew?" To which question counsel for defendant objected, because it is irrelevant and is immaterial and is conversations between others, but before the Court acted on said objections, the witness answered, "No sir, he did not, he said 'We have killed that Jew,' and that is all he said, if he did that I did not hear it and he did not say it in my presence." On redirect examination on the same point, counsel for defendant asked said witness the following question: "Who was it said that Mr. Bollinger." A. "Who said we have killed that damned Jew, I understood that nobody said that other?" —. Who was it said we have killed that Jew? A. "The engineer." Q. "When was that?" A. "Just before we stopped." Q. "That was just as you stopped on this occasion?" A. "Yes, sir."

The above *was* all of the questions and answers to the witness on said point. In reference to the evidence of Dave Thomas on the same point, counsel asked the following question: "Mr. Thomas did you hear the engineer make the remark, 'We have killed that damned Jew?'" A. "No sir, I did not." There was no objection whatever to this question or answer. On re-direct examination, counsel for defendant asked the witness Dave Thomas the following question: "Did anybody make such a statement?" A. "No Sir." The above is all that occurred on this point with the witness, Dave Thomas.

On the same point counsel for plaintiff- asked C. E. Fullerton the following question, "did you hear the engineer make the
70 remark 'we have killed that damned little Jew?" To which the witness answered "No sir, I did not." There was no objection whatever to either this question or the answer made by the witness. In reference to the same point counsel for plaintiff- asked

the witness, J. N. Haney, Jr., the same question, to which question counsel for defendant objected and the Court sustained said objection and the witness was not permitted to answer said question.

The above is all that occurred with reference to the matters contained in defendant's bill of exception No. 8.

L. C. BARRETT,
Special Judge.

Filed October 22nd, 1910. Frank Wolflin.

Defendant's Bill of Exception No. 9.

Filed October 22nd, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
PECOS & NORTHERN TEXAS RAILWAY COMPANY.

Be it remembered that on the trial of the above entitled and numbered cause, the following proceedings were had, to-wit:

71 The defendant's counsel introduced as a witness DAVE THOMAS, and showed by him that he was a brakeman on Train Number 30, the train that was leaving over track number four going East over the Southern Kansas line to Wynoka, and which train was leaving over track Number Four at the time of the accident happening on track Number Five, and that he was about one hundred and fifty feet North from where the accident occurred and saw the deceased, Rosenbloom, start suddenly diagonally across track number five in front of the ballast car, and saw him run over and killed. After such testimony was given by the witness he was turned over to the plaintiffs' counsel for cross examination, *which* the plaintiffs' counsel proceeded to interrogate him about his catching the caboose on his outgoing train after seeing the accident and leaving on train Number 30, and the following questions were asked, and received the following answers thereto, to-wit:

"Q. You say that in rolling over that way he got his body over the rail on the West side of the train simply cut his head off?"

"A. Yes, sir."

"Q. And you got on your freight train and went on, didn't you, and paid no attention to it further?"

"A. There was quite a crowd there. I knew I could do no good."

"Q. You never made any report of it did you, and never did say anything about it until you got off that trip?"

"A. The next day, I think, we made a statement."

* * * * * * *

72 "Q. Is it not true that you got on that freight train and never even reported this killing until you got back the next day?"

"A. Well, it was not for me to report."

"Q. I want you to answer my question: (Is it not true that you got on that freight train and never even reported this killing until you got back the next day?")

"A. I did not get back the next day. It was two or three days."

Here the Court interrupted the witness and says:

"He asked you if you didn't wait and report it when you got back. Answer the qeustion," after which counsel for plaintiff- proceeded to question him as follows:

"Q. Is it not true that you never reported this killing until you got back to Amarillo?"

"A. I did not."

"Q. When did you make a written report of the injury?"

"—. I can't remember the date."

"Q. Who dictated that report?"

"A. I don't remember the man's name."

"Q. When did you see it last?"

"A. This morning."

To which questions and answers the defendant's counsel then and there objected because they were irrelevant, incompetent and
73 immaterial, and only calculated to prejudice the minds of the jury against the defendant, and the Court then and there overruled such objections and permitted said questions and answers to go to the jury, to which ruling and actions of the Court the defendant then and there duly excepted, and now here makes and tenders this its bill of exceptions thereto and asks that the same be examined, approved and ordered filed as a part of the record herein.

MADDEN, TRULOVE & KIMBROUGH,
Attorneys for Defendant.

Examined, approved and ordered filed.

____ ____,
Special Judge Presiding.

Filed October 22nd, 1910. Frank Wolflin, District Clerk.

(See next page for qualification.)

Defendant's bill of exception No. 9 is correct except the grounds of objection to the evidence therein complained of.

The grounds of objection as stated in this bill are erroneous and not borne out by the record. The following are the grounds and only grounds of objection to the evidence complained of in this bill,
74 that said evidence was incompetent, irrelevant and immaterial and because the negligence of the witness, Dave Thomas was not an issue in this case. The above were the grounds and only

grounds of objection to the evidence complained of in this bill of exception and with this correction, I hereby approve said bill and order the same to be filed as a part of the record in this cause.

L. C. BARRETT,
Special Judge.

Filed October 22nd, 1910. Frank Wolflin, District Clerk.

Letter from Madden, Trulove & Kimbrough to L. C. Barrett, Special Judge.

Filed October 22nd, 1910.

The Pecos & Northern Texas Railway Company,
Madden, Trulove & Mimbrough, Attorneys,
General Offices, Amarillo, Texas.

October 13th, 1910.

Mr. L. C. Barrett, Special Judge, Amarillo, Texas.

DEAR SIR: On Monday the 10th we presented to Cooper & Stanford our statement in the case of Rosebloom against the Railway and they have it. Heretofore we have presented to you our Bills
75 No-. 1 and 2, and you have returned to us as refused substitutes for these two bills, re-written by someone else. These two refused bills we are filing with the Clerk. We are now handing you herewith Bills No-. 3, 4, 5, 6, 7, 8, and 9. We have had these bills prepared by Mr. Mood's deputy, Miss Mary McSpadden, from the record, and trust you will give them proper consideration at an early date and let us have them with your approval. Now we request that you do not mutilate these bills nor permit counsel for plaintiff- to mutilate them. If you have any modifications to append to them simply write your modifications and specify that you approve them with the limitations put upon them with your modifications or explanation of the bill. If you see fit to reject them without any modicication or explanation, then just simply mark them rejected and disallowed and sign them officially. We will thank you for your prompt action in this matter as we must get up our record and appeal at any early date and do not want to prepare our assignments of error until we get your action on these bills.

Yours truly,

MADDEN, TRULOVE & KIMBROUGH.

M. P.

Encl.

P. S.—If Cooper & Stanford want to suggest any modification of these bills let them do it on separate paper for you to pass upon and then you can have modification written on the bills if you
76 like. If you want any modification on the bills and will indicate what it is to us we will have it written on them for you in the form of a modification.

Y'rs truly,

M., T. & K.

That as I have qualified many of the bills of exception of defendant, I order the Clerk to put into the transcript the above letter to show why I qualified the bills instead of making complete substitutes.

L. C. BARRETT,
Special Judge.

Filed October 22nd, 1910. Frank Wolflin, District Clerk.

77 *Charge of the Court.*

Filed September 15th, 1910.

In the District Court of Potter County, Texas, July Term, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM
vs.
P. & N. T. RY. CO.

Gentlemen of the jury: The law applicable to this case is as follows:

1. By the term "ordinary care," as the same is used in this charge, is meant that degree of care and caution that a man of ordinary prudence would use under the same or similar circumstances.

2. By the term "negligence" as used in this charge, is meant the failure to exercise ordinary care.

3. By the term "proximate cause," as the same is used in this charge, is meant the efficient cause without which the injury would not have occurred.

4. If you find and believe from a preponderance of the evidence that before the ballast car struck the said M. A. Rosenbloom, that the said M. A. Rosenbloom was in peril and danger of being so struck by a ballast car and engine attached and you further believe from the evidence that the employees of the defendant company in charge of said ballast car and engine attached before the said M. A. Rosenbloom was struck by said ballast car, discovered that the said M. A. Rosenbloom was in peril, if the jury find he was in
78 peril, and that the said employees so discovered the peril of the said M. A. Rosenbloom in time to have avoided running against him, by the exercise of ordinary care and that the employees operating said engine and ballast car killing deceased after so discovering the peril and danger to the said M. A. Rosenbloom, if they did so, failed to exercise ordinary care to avoid running over and killing him, then and in such event you will find for the plaintiff-.

5. If you fail to find for the plaintiffs under the above instructions and under the evidence then your verdict will be for the defendant.

6. If you find for the plaintiffs, you will assess the damages for such a sum of money as if paid now would fairly compensate the plaintiffs for the pecuniary loss, if any, sustained by reason of the death of the said M. A. Rosenbloom.

7. If you find for all the plaintiffs, the form of your verdict will be as follows: "We, the jury, find for the plaintiffs — Dollars," and ap-portion said amount as follows, to-wit: To Mrs. M. A. Rosenbloom, $—; To Milton Rosenbloom $—; To Matilda Rosenbloom $—; To Isaac Rosenbloom, the father, $—, and to Minnie Rosenbloom, the mother $—; filling in said blanks with the amount so found by you.

8. If you find for a portion of the plaintiffs and not for all the plaintiffs, the form of your verdict will be as follows: "We, the jury, find for plaintiffs, (naming the plaintiffs) and apportion same
79 as follows: to —— —— plaintiff $—; to —— ——, plaintiff $— and to —— —— plaintiff $—, etc. (filling in the amount found for each plaintiff in gross then filling in the amount and we find for the defendant as to the other plaintiffs.

9. If you find for the defendant, the form of your verdict will be as follows: "We, the jury, find for the defendant."

9. You are the exclusive judges of the facts proven, of the credibility of the witnesses and of the weight to be given their evidence, but the law of the case is given you in this charge and any special charges submitted to you by the court if any and it is your duty to be governed thereby.

L. C. BARRETT,
Special District Judge, Potter County, Texas.

Filed Sept. 15, 1910. Frank Wolflin, District Clerk.

Special Charge in Lieu of Special Charge No. 9, Asked by Defendant.

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
P. & N. T. RY. CO.

Special Charge Given in Lieu of Special Charge No. 9, Requested by Defendant.

80 Gentlemen of the jury if you find that deceased was in peril, and such peril (if discovered) by the servants operating the ballast car and engine, then said servants had the right to presume that said deceased would get off the track, unless it became apparent to them he would not do so, now if you find that defendant through the servants operating the engine and ballast car saw deceased on the track and in danger and they warned him and you failed to find said servants realized that he would not get off the track or out of the way in time by the exercise of ordinary care to have avoided injuring him after such warning you will find for the defendant.

L. C. BARRETT,
Special Judge, Potter County, Texas.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 2 (Given).

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Railway Co.

The defendant requests the following special charge:

81 Unless the jury find and believe from a preponderance of the evidence that the engineer and switch crew in charge of the switch engine and ballast car, or some one of them, were negligent in their duties and that such negligence was the producing cause causing the death of M. A. Rosenbloom, the jury will return a verdict for the defendant.

MADDEN, TRULOVE & KIMBROUGH &
FRANK RYBURN,
Attorneys for the Defendant.

Requested in open Court after Court's charge to the jury is ready and before the jury retires, when the same is give-:

L. C. BARRETT,
Special Judge, Presiding.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 3 (Given).

Filed Sept. 15th, 1910.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Ry. Co.

Defendant requests the following charge:

82 The Court charges the jury to disregard any and all evidence, if any offered, showing or tending to show that Dave Thomas, the witness on the outgoing train No. Thirty, was guilty of negligence, and not to consider any negligence of his as basis of liability, no such negligence having been alleged and defendant not being liable on account thereof in this case.

MADDEN, TRULOVE and KIMBROUGH and
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after the Court charges the jury and before the jury retires when the same is given.

L. C. BARRETT,
Special District Judge, Presiding.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 5 (Given).

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

Special Charge No. 5, Requested by the Defendant.

You are instructed that the plaintiff is requested to establish
83 her case by a preponderance of the evidence, and unless you find that plaintiff has so proven her case, you will find for the defendant.

MADDEN, TRULOVE & KIMBROUGH AND
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after the reading of the Court's charge and before the retirement of the jury when the same is by the Court given.

L. C. BARRETT,
Special District Judge, Presiding.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 7 (Given).

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

Defendant requests the following special charge:
If the death of M. A. Rosenbloom resulted from his own act without any concurrent and negligent act of the switch crew, or any one of the switch crew handling the switch engine and ballast car in

question, as a direct and producing cause, the jury should find
84 for defendant and so say by their verdict.

MADDEN, TRULOVE & KIMBROUGH AND
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after the Court's Charge is read to the jury and before the jury retires, when same is goven.

L. C. BARRETT,
Special Judge, Presiding.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 8 (*Given*).

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

The defendant requests the following special charge:

If the jury, after considering the testimony and under the law as given in charge by the Court, find therefrom in favor of plaintiff and against the defendant, then you are charged that, in estimating the amount or measure of damages you will allow, if any, you should not take into consideration but wholly disregard all physical pain and mental suffering, if any, suffered by plaintiff and all those for
85 whom she sues; because physical pain and mental suffering cannot legally be considered as an element of damages recoverable by plaintiffs or either of them.

MADDEN, TRULOVE AND KIMBROUGH AND
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after the Court reads his charge to the jury and before the jury retires, to consider their verdict, when same is given.

L. C. BARRETT,
Special District Judge.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 11 *(Given).*

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

The defendant requests the following special charge:

If from the evidence and under the law as given you in charge by the Court, the jury find for plaintiff and against defendant, it will become and be your duty to estimate, apportion and say in your verdict how much you will allow for each of the surviving wife and two children of deceased M. A. Rosenbloom. In ascertaining
86 the loss, if any, sustained by the surviving wife and children of M. A. Rosenbloom you will take into consideration the evidence as to his age, and the length of time he would probably have lived, his earning capacity, his probable earnings, his habits of industry, his health, his disposition to contribute to the support of his wife and children, and as to any other alleged facts, if any, bearing on this issue, in support of which evidence has been offered; and from such evidence, you will consider how much, if any, of the future earnings of M. A. Rosenbloom would have been expended for the personal benefit of Mrs. M. A. Rosenbloom the amount she would probably have received from his earnings, if any, and for the use and benefit of each of the children such an amount as they each would probably have received from his earnings, and their loss of his care, control and training. If you find that plaintiffs are entitled to recover same amounts and cannot say from the evidence what amount any one should recover, you will find for such one or ones nominal damages.

MADDEN, TRULOVE & KIMBROUGH AND
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after the Court's Charge is read to the jury and before the jury retires to consider of their verdict, when same is Given.

L. C. BARRETT,
Special District Judge, Potter County.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

87 *Defendant's Special Charge No.* 1. (*Refused.*)

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

The Defendant requests the Court to charge the jury as follows:
The Court charges the jury that the plaintiffs are not entitled to recover in the capacity in which they sue herein and you are, therefore, instructed to return a verdict for the defendant.

MADDEN, TRULOVE & KIMBROUGH AND
FRANK RYBURN,
Attorneys for the Defendant.

Requested in open Court at the conclusion of the evidence and argument, when the same is refused.

L. C. BARRETT,
Special District Judge.

Filed September 15th, 1910, Frank Wolflin, District Clerk.

Defendant's Special Charge No. 4. (*Refused.*)

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

88 The defendant requests the following special charge:
The Court charges the jury to disregard all evidence offered, if any, offered to prove and tending to prove that the engineer in charge of the switch engine was guilty of negligence in not stopping the engine within a given space or certain distance, and not consider such evidence as a basis of liability herein.

MADDEN, TRULOVE & KIMBROUGH AND
FRANK RYBURN,
Attorneys for Defendant.

Suggested in open Court after the Court charges the jury and before the jury retires when the same is refused.

L. C. BARRETT,
Special District Judge, Presiding.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 6. (Refused.)

Filed Sept. 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

Defendant requests the following special charge:

89 Unless the jury find from the evidence, that defendant's employes who were handling the switch engine and ballast car at the time of the accident were guilty of negligence as is alleged by plaintiff, as the term negligence is defined in the charge of the Court, and also that such negligence was a direct producing cause of the death of M. A. Rosenbloom, you will find for defendant.

MADDEN, TRULOVE & KIMBROUGH AND
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after the Court's charge to the jury is read and before the jury retires to consider of their verdict, when the same is refused.

L. C. BARRETT,
District Judge.

Filed September 15th, 1910. Frank Wolflin, District *Judge.*

Defendant's Special Charge No. 9. (Refused.)

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RAILWAY COMPANY.

The defendant requests the Court to give in charge to the jury the following special charge, to-wit:

90 If, while the switch engine and ballast car were being run along down track No. 5, the deceased, M. A. Rosenbloom, was seen on or so dangerously near the track ahead of him as to make it reasonably appear that if the engine and car kept on running towards Rosenbloom and he did not get out of the way, he might be struck by the car and hurt or killed, it was the duty of the engineer and switch crew to give him some warning or the approach, by blowing whistle, ringing bell, hollowing at him, or some other warning such as they could reasonably expect, under the circumstances, would be sufficient to attract the attention of a reasonably prudent

person in possession of his natural sense and desirous of securing his own safety. After giving such signal of warning, if they did give a signal or warning, said engineer and crew had a right to presume and rely upon M. A. Rosenbloom heeding such signal or warning and exercise such reasonable care to clear the track for his own safety as a reasonably prudent person in the possession of all his natural sense and faculties would have exercised under the existing circumstances, and to proceed with the engine and car along said track accordingly, until it become apparent to such engineer and switch crew, (if it did) that M. A. Rosenbloom either would not or could not clear said track and save himself from injury by such car and engine.

If said engineer and crew discovered said Rosenbloom on, or so dangerously near said track that it was reasonably apparent to them that he would not or could not save himself by getting out
91 of the way of such passing engine and car, but would be struck and injured if they kept going, it immediately, upon so learning that Rosenbloom was in such perilous position and either would not or could not save himself, became the duty of such engineer and crew to use all means at their command, consistent with the safety of others, to avoid running onto and injuring said Rosenbloom; but such duty did not arise until it became known and apparent to such engineer and crew that Rosenbloom was in such danger and that he could not, or would not save himself. Unless you find from the evidence that Rosenbloom was so in danger and by said engineer and crew discovered to be in such danger, when he could not or would not save himself by the use of such efforts as a reasonably prudent person, in possession of all his natural faculties and senses, would have exercised for his own safety, and that such engineer and crew in charge of said switch engine and ballast car, failed to exercise all means at their command, consistent with the safety *other*, to avoid striking and injuring him, and that such failure on their part was the cause of the death of Rosenbloom, then you will find for defendant.

MADDEN, TRULOVE & KIMBROUGH &
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after the Court's main charge is read to the jury and before the jury retires, when the same is refused.

L. C. BARRETT,
Special District Judge, Presiding.

92 Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 10 (*Refused*).

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

The defendant requests the following charge:

If the jury find from the evidence that Defendant's engineer and switch crew in charge of the switch engine and ballast car that ran over and killed M. A. Rosenbloom or any one or more of them, were negligent, as is alleged, by plaintiff, and that such negligence was a producing cause of the death of M. A. Rosenbloom; and if you also find that M. A. Rosenbloom was himself guilty of negligence and that his negligence concurring with that of such employee or employees of defendant was a producing cause of his death; and if because of such negligence (if any), on the part of defendant's employee or employees, you determine to find plaintiff, then it will be your duty to diminish the damages you find in proportion to the amount of negligence attributable to M. A. Rosenbloom.

MADDEN, TRULOVE & KIMBROUGH AND
FRANK RYBURN,
Attorneys for Defendant.

93 Requested in open Court's charge to the jury is read and before the jury retires, when the same is refused.

L. C. BARRETT,
Special Judge, Presiding.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 12 (*Refused*).

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

The Defendant requests the following special charge:

The Court charges the jury that the duty of the Defendant's engineer and employes in charge of the switch engine and ballast car in question to exercise care to avoid striking and killing M. A. Rosenbloom in a position of discovered peril would not arise until M. A.

Rosenbloom was in fact in a perilous position, and until he was known by such employes of the defendant to be in such perilous position, and that he could not or would not be able to extricate himself from such perilous position; and unless they discovered him in such perilous position and failed to exercise due care to avoid injuring him after discovering him in such perilous position, you will
94 find for the defendant.

MADDEN, TRULOVE & KIMBROUGH &
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after Court's Charge is read to the jury and before the jury retires, when the same is refused.

L. C. BARRETT,
Special Judge, Presiding.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Defendant's Special Charge No. 13 (*Refused*).

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

The defendant requests the following special charge:
If M. A. Rosenbloom, at the time of his death was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part, and a customary work reasonably carried on by defendant as a part of its business transporting freight interstate over its lines or if he had then just com-
95 pleted such inspection *or* said train and had not yet completed his record and placed — in its place where usually kept. then you will return a verdict for defendant on its special plea that plaintiff had no right to maintain this suit in the capacity in which she sues.

MADDEN, TRULOVE & KIMBROUGH &
FRANK RYBURN,
Attorneys for Defendant.

Requested in open Court after the Court's charge is read and before the jury retires, when same is refused.

L. C. BARRETT,
Special Judge.

Filed September 15th, 1910. Frank Wolflin, District Clerk.

Verdict of Jury.

Filed September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

We, the jury, find for plaintiffs Seven Thousand and no/100 Dollars, and apportion said amount as follows, to-wit:
Mrs. M. A. Rosenbloom $2,000.00.
Milton Rosenbloom $2,000.00.
Matilda Rosenbloom $2,000.00.
96 Isaac Rosenbloom (Father) $500.00.
Minnie Rosenbloom (Mother) $500.00.

D. W. OWEN, *Foreman.*

Amarillo, Texas, September 15-1910.

Filed September 15th 1910. Frank Wolflin, District Clerk.

Verdict and Judgment.

FRIDAY, September 15th, 1910.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

Be it remembered that on the 13th day of September A. D. 1910, the above entitled and numbered cause came on for trial, whereupon both parties appeared in open Court and announced ready for trial, whereupon came a jury of twelve good and lawful men, consisting of D. W. Owen Foreman, and eleven others, who after being duly empaneled and sworn and who after having heard the pleadings read, the evidence adduced upon the trial, the argument of counsel and having received the charge of the Court, retired to consider of their verdict and on the 15th day of September, 1910, returned into open Court the following verdict:

"We, the jury find for plaintiffs, Seven Thousand and
97 no/100 Dollars and apportion said amount as follows; to-wit:
Mrs. M. A. Rosenbloom $2,000.00.
Milton Rosenbloom, $2,000.00.
Matilda Rosenbloom, $2,000.00.
Isaac Rosenbloom (Father) $500.00.
Minnie Rosenbloom, (Mother) $500.00.

D. W. OWEN, *Foreman.*"

Amarillo, Texas, September 15-1910.

And it appearing to the Court that said verdict ought in all things to be confirmed and affirmed, it is therefore ordered, adjudged and decreed by the Court, that the plaintiff, Mrs. M. A. Rosenbloom do have and recover for herself and in her own right, of and from the defendant, the Pecos & Northern Texas Railway Company, the sum of $2,000.00.

It is further ordered, adjudged and decreed by the Court that the plaintiff, Mrs. M. A. Rosenbloom do have and recover of and from the defendant, for the use and benefit of Isaac Rosenbloom, the sum of $500.00, and for the use and benefit of Minnie Rosenbloom the sum of $500.00.

It is further ordered adjudged and decreed by the Court that Milton Rosenbloom, a minor, by his next friend, Mrs. M. A. Rosenbloom do have and recover of and from the defendant the sum of $2,000.00.

It is further ordered, adjudged and decreed by the Court that Matilda Rosenbloom, a minor, by her next friend, Mrs. M. A. Rosenbloom, do have and recover of and from the defendant, the sum of $2,000.00.

98 It is further ordered by the Court that in case this judgment is paid before said minors become of age, that then the amounts awarded to said minors herein shall be paid to the Clerk of this Court, to be by the Clerk of this Court held until such time as a Guardian may have duly qualified for said minors.

It is further ordered that all costs herein incurred be adjudged against the defendant and that this judgment bear 6% interest from date, for all of which let execution issue.

O. K.

L. C. B.

Defendant's Motion for New Trial.

Filed September 16th, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Ry. Co.

Now comes the defendant in the above entitled and numbered cause and moves the Court to set aside the verdict and judgment rendered against it herein on the 15th day of September 1910, and to grant the defendant a new trial herein for the following reasons, to-wit:

I.

L. C. Barrett, as special Judge, erred in assuming the bench and in assuming to call and dispose of this case for that he was not a duly

elected, qualified and acting special judge and there was no
99 authority in law for his acting as special judge, and he erred in overruling the defendant's objections to his acting as special judge upon the trial of this cause, as will be shown by the defendant's bill of exception thereto taken.

II.

The Court erred in postponing the case of Anna Guernsey et al. vs. Z. Z. Savage et al., which had preference on the docket over this cause, and in calling this cause out of its order, as will be shown by bill of exception to such action of this Court duly taken.

III.

The Court erred in calling this cause out of its order and forcing defendant to answer and plead herein, as will be shown by bill of exception thereto duly taken at the time.

IV.

The Court erred in sustaining plaintiffs' general demurrer to defendant's special plea to the jurisdiction of this Court, and in striking out said plea.

V.

The Court erred in overruling the defendant's general demurrer to plaintiffs' petition.

VI.

The Court erred in overruling defendant's first special demurrer to plaintiffs' amended petition.

VII.

The Court erred in overruling the defendant's second special demurrer to plaintiffs' amended petition.

100 VIII.

The Court erred in overruling defendant's third special demurrer to plaintiffs' amended petition.

IX.

The Court erred in admiting in evidence, over defendant's objection, the evidence of plaintiffs' witnesses Briles and Stewart, and the evidence tending to show that the engineer in charge of the switch engine was guilty of negligence in that he did not stop the train as speedily as it might have been stopped according — the opinion of such expert witnesses, as will appear from bill of exception tak*ing* to such proceedings.

X.

The Court erred in admitting in evidence, over defendant's objection, the testimony of Dave Thomas on cross examination, offered for the purpose of intending to show that he was negligent, as will appear from bill of exception thereto taken.

XI.

The Court erred, on divers occasions during the — in commenting on the weight of the testimony and making remarks before the jury, as will appear by bills of exception thereto taken.

XII.

The Court erred in his charge to the jury, in that he failed to state properly the issues raised by the pleadings to the jury.

101

XIII.

The Court erred in giving in charge to the jury paragraph or division Number One of the Charge of the Court.

XIV.

The Court erred in giving in charge to the jury paragraph or division number two of the charge of the Court.

XV.

The Court erred in giving in charge to the jury paragraph or division number Three of the charge of the Court.

XVI.

The Court erred in giving in charge to the jury paragraph or division number Four of the Charge of the Court.

XVII.

The Court erred in giving in charge to the jury paragraph or division number Five of the charge of the Court.

XVIII.

The Court erred in giving in charge to the jury paragraph or division number six of the Charge of the Court.

XIX.

The Court erred in giving in charge to the jury paragraph or division number seven of the charge of the Court.

XX.

102 The Court erred in giving in charge to the jury paragraph or division number Eight of the charge of the Court.

XXI.

The Court erred in giving in charge to the jury paragraph or division number Nine of the Charge of the Court.

XXII.

The Court erred in refusing to give in charge to the jury special charge number One requested by the defendant.

XXIII.

The Court erred in refusing to give in charge to the Jury special charge Number Four requested by the defendant.

-XIV.

The Court erred in refusing to give in charge to the jury special charge number Six requested by the defendant.

XXV.

The Court erred in refusing to give in charge to the jury special charge number nine requested by the defendant, and as well in giving in charge to the jury special charge prepared by the Court in lieu of said special charge number nine so requested by defendant.

XXVI.

The Court erred in refusing to give in charge to the jury special charge number Ten requested by the defendant.

103 XXVII.

The Court erred in refusing to give in charge to the jury special charge number Twelve requested by the defendant.

XXVIII.

The Court erred in refusing to give in charge to the jury special charge number Thirteen requested by the defendant.

XXIX.

The verdict and judgment of the jury are contrary to, and unsupported by the law and facts in this cause for this:

A. The evidence entirely fails to show any actionable negligence upon the part of the defendant, its agents, servants or employees, in the manner or form as stated in plaintiff's original petition.

B. The evidence shows conclusively that the deceased M. A. Rosenbloom was negligent, and that his negligence, without any concurrent negligence upon the part of the defendant or its agents or employes, was the sole producing cause of death of the said M. A. Rosenbloom.

C. There is absolutely no testimony whatever to show that M. A. Rosenbloom became and was in a perilous position from which he could not and would not extricate himself, and that the engineer or other employes of the defendant in charge of the switch engine and ballast car in question, saw or discovered M. A. Rosenbloom in such perilous position failed to exercise due care to avoid injuring him.

104 D. The evidence shows clearly that M. A. Rosenbloom walked upon the track immediately in front of the ballast car and that the defendant's employes, members of the switch engine, especially the engineer, could not possibly after discovering M. A. Rosenbloom on the track or going on the track in front of the car, have avoided striking him with the ballast car in question.

Wherefore defendant prays the judgment and order of this Court setting aside the said verdict and judgment and granting a new trial herein, to the end that justice may be done.

MADDEN, TRULOVE & KIMBROUGH AND
FRANK RYBURN,
Attorneys for the Defendant, The Pecos & Northern Texas Railway Company.

Filed September 16th, 1910. Frank Wolflin, District Clerk.

Order Overruling Motion for New Trial.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS RY. CO.

Saturday, September 17th, 1910.

On this day came on regularly to be heard and tried the defendant's motion for a new trial herein filed on the 16th day of
105 September, 1910. Thereupon came the parties and announced ready on the motion which was regularly submitted to and considered by the Court: the Court having duly heard and considered said motion, is of opinion that the same is not well taken and that the law is against it. Therefore it is ordered and adjudged by the Court, that defendant's said motion be and the same is in all things overruled and refused. To which ruling and action and judgment of the Court, the defendant then and there in open Court

duly excepted and gave notice of appeal to the Court of Civil Appeals within and for the Second Supreme Judicial District of Texas.

On Motion of defendant, then and there made in open Court, showing necessity for such order, it is further ordered, that the bills of exceptions and statements of fact for appeal from the judgment of this Court, may be made up and filed at any time on or before the 30th day next ensuing after the final adjournment of the Court for the present term.

Supercedeas Bond.

Filed October 5th, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. Rosenbloom et al.
vs.
The Pecos & Northern Texas Ry. Co.

Whereas, in the above numbered and entitled cause, pending in the District Court of Potter County, and at a regular term
106 of said Court, to-wit; on the 15th day of September, 1910, the said M. A. Rosenbloom, Milton Rosenbloom, Matilda Rosenbloom, Isaac Rosenbloom and Minnie Rosenbloom, recovered a judgment against the said defendant, the Pecos & Northern Texas Railway Company for the sum of Seven Thousand Dollars ($7,000.00) with interest thereon from the 15th day of September 1910, at six per cent per annum, and all costs of suit; and

Whereas, afterwards, on the 17th day of September said Court regularly overruled said defendant's motion for a new trial in said cause; and

Whereas, the said defendant has taken an appeal to our Court of Civil Appeals for the Second Supreme Judicial District at Ft. Worth, in the County of Tarrant, and desires to suspend said judgment pending such appeal;

Now, therefore, We, the Pecos and Northern Texas Railway Company as principal, and —— —— and —— —— as sureties, acknowledge ourselves to be bound to pay the said plaintiffs Mrs. M. A. Rosenbloom, Milton Rosenbloom, Matilda Rosenbloom, Isaac Rosenbloom, and Minnie Rosenbloom, the sum of Fifteen Thousand ($15,000.00) Dollars, Conditioned: That the said the Pecos & Northern Texas Railway Company, appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals, shall be against it, said appellant shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

107 Witness our signatures signed this the 5th day of October A. D. 1910.

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY,
By MADDEN, TRULOVE & KIMBROUGH,
Attorneys of Record.
RAY WHEATLEY, *Surety.*
CHAS. A. FISK, *Surety.*

I have fixed the probable amount of costs of this suit in the Court of Civil Appeals, the Supreme Court and the Court below, at $250.00, and approve the foregoing bond this the 5th day of October 1910.

FRANK WOLFLIN,
Clerk of the District Court of Potter County, Texas,
By ROLLIE H. SCALES, *Deputy.*

Filed October 5th, 1910. Frank Wolflin, District Clerk.

108 *Defendant's Assignment of Error.*

Filed October 31st, 1910.

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. ROSENBLOOM et al.
vs.
THE PECOS & NORTHERN TEXAS *Texas* RY. CO.

Now comes the Pecos and Northern Texas Railway Company, and appealing from the judgment rendered against it in the above entitled and numbered cause by the trial Court shows that there were errors committed by said Court and apparent of record, as follows, to-wit:

I.

The Court erred in refusing to grant defendant's counsel time to prepare and have them approve and file bills of exceptions wherein and whereby they sought to complain of the action of the Court in postponing the preceding case on the docket and calling this case, and as well, in a second bill, to question the legal competency and right of L. C. Barrett to preside as special Judge on the trial of this cause and to question the regularity and legality of his election and qualification as such special Judge; as all of which appears from substitute bills of exceptions Nos. 1, and 2, prepared by the Court and Bill No. 3, prepared by defendant's counsel and refused with appended explanation.

II.

109 The trial Court erred in overruling defendant's first Special Demurrer to plaintiffs' amended original petition, which is as follows:

"It fails to allege facts showing whether or not the defendant was engaged on intrastate or interstate commerce at the time of the death of M. A. Rosenbloom, and further fails to allege facts showing whether said cars that he was inspecting, listing and sealing, and in connection with which he was working at the time, were loaded with goods and freights being inter-state or intra-state.

III.

The Trial Court erred in overruling the defendant's first special demurrer to plaintiffs' amended original petition, which is as follows:

"Said petition fails to allege facts showing that plaintiff is entitled to sue and recover in the capacity in which she sues."

IV.

The trial Court erred in overruling defendant's third special demurrer to plaintiffs' amended original petition, which is as follows:

"Said petition fails to allege facts showing that the injuries alleged were the natural consequence and probable result of the acts of negligence, as shows that the said injuries were speculative, uncertain and remote contingencies, so that defendant's employes could not at the time have been expected to anticipate the death of M. A. Rosenbloom as the natural and probable consequence of the acts by them committed.

110 V.

The trial Court erred in interrupting counsel for defendant while cross examining plaintiffs' witness Haney and his rulings and remarks before the jury and in refusing to grant defendant's counsel time then and there to prepare and have place of record a bill of exception to such actions and rulings of the Court, as will appear from defe-dant's bill of exception No. 4, and the Court's modification thereof, as the same appears of record and which is hereby referred to.

VI.

The Court erred in permitting the plaintiffs' counsel to ask leading questions to their witness, J. N. Haney, Jr. as appears from defendant's bill of exceptions No. 5, in the record, to which reference is here made.

VII.

The Court erred in admitting in evidence the testimony of plaintiffs' witness, M. Briles and Pat Stewart and the cross examination

of Defendant's witness Walker as to the distance in which an engine and car could be stopped under certain conditions, as is fully complained of in Defendant's bill of exception No. 6, to which reference is here made.

VIII.

The trial Court erred in permitting plaintiffs' counsel, during the cross examination of defendant's witness Walker as to his knowledge and understanding of the results of running the engine and ballast car down track No. 5, and as well in permitting questions in
111 the manner and form propounded, and in interrupting the examination, and in making his remarks before the jury with reference to the examination of the witness, as is complained of in defendant's bill of exception No. 7, to which reference is here made.

IX.

The trial Court erred in permitting plaintiff's counsel to ask repeatedly on the cross examination of defendant's witness Bollinger, and on the cross examination of defendant's witness Dave Thomas, and on the cross examination of the defendant's witness, C. E. Fullington, and on the examination of plaintiff's witness Jasper N. Haney, if the engineer or some one did not say; "We have run over and killed that damned little Jew." Which testimony was duly excepted to by defendant's counsel at the time, as will fully appear from Defendant's bill of exception No. 8 to which reference is here made.

X.

The Court erred in permitting plaintiff's counsel on cross examination of the witness Dave Thomas, to interrogate him as to his having boarded his train after seeing Rosenbloom killed and left without making a report, and not making a report until later, and in the manner and form of the questions propounded, over defendant's objection, as will fully appear from defendant's bill of exceptions No. 9, which is now here referred to.

XI.

The trial Court erred in his charge to the jury, in that he fails therein properly to state the issue arising upon the pleadings and evidence in this cause.

112 XII.

The trial Court erred in giving in charge to the jury paragraph No. 3, of the Court's charge, which is as follows:

"By the term 'proximate cause' as the same is used in this charge, is meant the efficient cause without which the injury would not have occurred."

XIII.

The trial Court erred in giving in charge to the jury, paragraph or division 4 of his charge, which is as follows:

"If you find and believe from a preponderance of the evidence, that before the ballast car struck the said M. A. Rosenbloom that said Rosenbloom was in peril and danger of being so struck by a ballast car and engine attached, and you further believe from the evidence that the employes of defendant Company in charge of said ballast car and engine attached, before the said M. A. Rosenbloom was struck by said ballast car, discovered that said M. A. Rosenbloom was in peril, if the jury find he was in peril, and that said employes so discovered the peril of the said M. A. Rosenbloom in time to have avoided running against him, by the exercise of ordinary care, and that the employes operating said engine and ballast car killing deceased, after so discovering the peril and danger to said M. A. Rosenbloom, if they did so, failed to exercise ordinary care to avoid running over and killing him, then and in such event, you will find
113 for the plaintiff."

XIV.

The trial Court erred in giving in charge to the jury paragraph or division No. 6, of the Court's charge which is as follows:

"If you find for the plaintiffs you will assess the damages for such sum of money as if paid now would fairly compensate the plaintiffs for the pecuniary loss, if any, sustained by reason of the death of the said M. A. Rosenbloom."

XV.

The trial Court erred in refusing to give in charge to the jury special charge No. 1, requested by defendant, which is as follows:

"The Court charges the jury that the plaintiffs are not entitled to recover in the capacity in which they sue herein and you are, therefore, instructed to return a verdict for the defendant."

XVI.

The trial Court erred in refusing to give in charge to the jury special charge No. 4, requested by defendant, which is as follows:

"The Court charges the jury to disregard all evidence offered, if any, *offered* to prove and tending to prove that the engineer in charge of the switch engine was guilty of negligence in not stopping the engine within a given space or certain distance, and not to consider such evidence as the basis of liability herein."

114

XVII.

The trial Court erred in refusing to give in charge to the jury special charge No. 6, requested by defendant, which is as follows:

"Unless the jury find from the evidence that defendant's employes who were handling the switch engine and ballast car at the time of

the accident were guilty of negligence, as is alleged by plaintiff, as the term negligence is defined in the charge of the Court, and also that such negligence was the direct producing cause of the death of M. A. Rosenbloom you will find for defendant."

XVIII.

The trial Court erred in refusing to give in charge to the jury special charge No. 9, requested by defendant, and in substituting in lieu thereof special charge in lieu of Charge No. 9, requested by defendant, as the same appears in the record."

XIX.

The trial Court erred in refusing to give in charge to the jury special Charge No. 10, requested by defendant, which is as follows:

"If the jury find from the evidence that defendant's engineer and switch crew in charge of the switch engine and ballast car that ran over and killed M. A. Rosenbloom, or anyone or more of them, were negligent, as is alleged by plaintiff, and that such negligence was a producing cause of the death of M. A. Rosenbloom; and if you so find that M. A. Rosenbloom was himself guilty of negligence,
and that his negligence, concurring with that of such em-
115 ployee or employes, of defendant was the producing cause
of his death; and if because of such negligence (if any), on the part of the defendant's employee or employes, you determine to find for plaintiff, then it will be your duty to diminish the damages you find in proportion to the amount of the negligence attributable to M. A. Rosenbloom.

XX.

The trial Court erred in refusing to give in charge to the jury special charge No. 12, requested by defendant, which is as follows:

"The Court charges the jury that the duty of the defendant's engineer and employes in charge of the switch engine and ballast car in question to exercise care to avoid striking M. A. Rosenbloom in a position of discovered peril would not arise until M. A. Rosenbloom was in fact in a perilous position and until he was known by such employes of the defendant to be in such perilous position, and that he could not, or would not be able to extricate himself from such perilous position and failed to exercise due care to avoid injuring him after so discovering him in such perilous position, you will find for the defendant."

XXI.

The Court erred in refusing to give in charge to the jury special charge No. 13, requested by defendant, which is as follows:

"If M. A. Rosenbloom at the time of his death was engaged
116 in examining seals and making record of the seals on cars
being transported inter-state over the line of defendant and

other lines of connecting carriers, and if such work was a necessary part and a customary part of its business — transporting freight interstate over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict for defendant on its special plea that plaintiff had not right to maintain this suit in the capacity in which she sues."

XXII.

The verdict and judgment are erroneous, and the trial Court erred in overruling defendant's motion for new trial because such verdict and judgment are erroneous, as is specified in cause No. XXIX in defendant's motion for new trial contained, which is as follows:

"The verdict and judgment of the jury are contrary to and unsupported by the laws and the facts in this case, for this: (*a*) That the evidence entirely fails to show any actionable negligence upon the part of defendant, its agents, servants and employes, in the manner and form stated in plaintiffs' original petition; (*b*) The evidence shows conclusively that deceased, M. A. Rosenbloom, was negligent and that his negligence, without any concurrent negligence upon the part of the defendant or its agents and employes, was the sole producing cause of the death of said M. A. Rosenbloom; (*c*) There is absolutely no testimony whatever to show that M. A. Rosenbloom became and was in a perilous position from
117 which he could not or would not extricate himself, and that the engineer, or other employes of the defendant in charge of the switch engine and ballast car in question, saw or discovered M. A. Rosenbloom in such perilous position, and after so seeing and discovering him in such perilous position, failed to exercise due care to avoid injuring him; (*d*) The evidence shows clearly that M. A. Rosenbloom walked upon the track immediately in front of the ballast car and that defendant's employes, members of the switch crew, especially the engineer, could not possibly, after discovering M. A. Rosenbloom on the track, or going on the track in front of the car, have avoided striking him with the ballast car in question."

Wherefore, Defendant appeals and prays the judgment of the Court of Civil Appeals reversing and dismissing and remanding this cause for a new trial as the laws in such cases made and provided may require.

MADDEN, TRULOVE AND KIMBROUGH AND
F. M. RYBURN, *Attorneys for Appellant,*
The Pecos & Northern Texas Ry. Co.

Bill of Costs.

No. 1204.

Mrs. M. A. ROSENBLOOM et al., Plaintiff-,
vs.
P. & N. T. RY. CO., Defendant.

M. —— ——, as Principal, and —— ——, as Sureties, to Officers of Court, Dr.

To costs accrued in above entitled cause to adjournment of —— Term, 19—.

Clerk's fees.	Plaintiff.	Defendant.
Filing and Docketing	.35	
Contract	.40	
Issuing Citations or Writs	2.50	
Copy Petition	....	
Recording Returns	....	
Filing 20 40 Papers	3.00	6.00
Entering 4 I Appearances	.60	.15
Copy Interrog. for Precepts	4.00	3.75
Issuing Precepts	....	3.00
Copy Interrog. for Com	3.50	3.00
Issuing 1 2 Commission	.75	1.50
Filing Depositions & Certs	....	.80
Issuing Subpœnas	2.00	
Affidavits of Wit	.50	
Motions	....	.30
Entering Continuances	....	
Entering Orders 10 4	7.50	3.00

Sheriff's fees.	P't'ff.	Def't.
Executing Citations	1.85	
" Precepts	....	1.50
" Subpœnas	3.00	
" Notices	....	
Sheriff Jury Fee	.50	
Total	$5.35	$1.50
County Judge's Fees	....	
Jury Fee Pd. P't'ff	5.00	
Witness Fees	....	
M. Briles	2.00	
Notary Fees	....	
Sam R. Merrell, N. P	....	2.50
W. G. Houch	....	2.27
Dept. of G. H. Boulton	5.00	

Swearing Jury—Recdg. Verd.....	.70	
Swearing 6 10 Witnesses.....	.60	1.00
Assessing damages.....	....	
Final Judgment.....	....	1.50
Taxing Costs.....	....	
Issuing Return.....	....	
Filing and Approvg. Bond.....	....	1.65
Transcript	....	64.80
2 Certs. on stat. facts.....	....	1.00
Filing Brief.....	....	
Issuing Notices.....	....	
Abstract of Judgment.....	....	
Total Clerk's Fees.....	26.40	91.45

Clerk's Costs Bt. over.....	26.40	91.45
	46.75	98.72
		46.75
		$144.47

119 *Certificate.*

THE STATE OF TEXAS,
County of Potter:

I, Frank Wolflin Clerk of the District Court of Potter County, Texas, do hereby certify that the above and foregoing contains a true and correct transcript of all the proceedings had in cause No. 1204, Mrs. M. A. Rosenbloom et al. vs. the Pecos & Northern Texas Railway Company, as the same appears on file and of record in my said office.

Given under my hand and seal of said Court at office in the City of Amarillo, Texas, this the 1st day of November, A. D. 1910.

FRANK WOLFLIN,
Clerk District Court, Potter County, Texas,
[SEAL.] By M. H. HARDIN, *Deputy.*

120 (Endorsed:) No. 1204. Pecos & Northern Texas Ry. Co., Appellant, vs. Mrs. M. A. Rosenbloom, et al. Appellees. From the District Court of Potter County. Applied for by Madden, Trulove & K. Attorneys for Appellants on the 5th day of Oct. 1910, and delivered to Madden T. & K. on the 1st day of Nov. 1910. Frank Wolflin, Clerk, Dist. Court Potter County, Texas. By M. H. Hardin, Deputy. Filed in Court of Civil Appeals at Ft. Worth, Texas, the 27th day of December, 1910. J. A. Scott, Clerk, Court of Civil Appeals 2 Supreme Judicial District of Texas. By D. B. Trammell, Jr., Deputy. Filed in Court of Civil Appeals for Seventh Supreme Judicial District of Texas. Jul. 31, 1911. J. M. Oakes, Clerk. No. 2364. 7th Dist. Filed in Supreme Court, Jan. 26, 1912. F. T. Connerly, Clerk. By J. S. Myrick, Deputy. Submitted Apl. 15, 1914. Orally argued by S. H. Madden for P't'ff in Error and by J. A. Stanford (Waco) for Deft. in Error. Madden, Trulove & Kimbrough, Attorneys for Appellant, Amarillo, Texas, P. O. Address. Cooper & Stanford, Attorneys for Appellees, Amarillo, Texas, P. O. Address.

121 *Statement of Facts.*

In the District Court of Potter County, Texas.

No. 1204.

Mrs. M. A. ROSENBLOOM
vs.
THE P. & N. T. RY. CO.

Be it remembered, that upon the trial of the above entitled and numbered cause, the following facts were proven, and are all the facts that were proven, to-wit:

Plaintiff's Direct Testimony.

J. N. HANEY, JR., testified for plaintiff- as follows:

I have lived at 909 Van Buren Street in Amarillo, Potter county, Texas, since June 1907. Came here from Ft. Worth. Never lived in Canyon City but have visited there. I am the son of J. N. Haney, who lives in Amarillo. I was acquainted with M. A. Rosenbloom during his life-time and remember the circumstances of his death. He was run over and killed almost opposite the Early Grain & Elevator Company in Amarillo, Texas. I was acquainted with the yards near the Early Grain & Elevator Company at that time. It is
what is known as the switch yards. The tracks of that yard
122 extend in the general direction of North and south as I understand the cardinal points of this country. This yard is connected with two leads and the tracks along at that point are known as the middle yards. There is a main line and seven tracks run parallel with it. The side tracks are east of the main line and they are numbered from one to seven, commencing with the first track east of the main line as number one, next number two, the next number three, the next number four, and so son from west to east. Mr. Rosenbloom was killed on track number five. He was in the service of the defendant at that time. He was employed as yard clerk or assistant yard clerk, I do not know which. His duty was to seal the cars that either came into the terminal not sealed and to seal all cars that were loaded here for the purpose of being moved and on the arrival of inbound train to take what is called a switch list for use as reference and to note the condition of the cars and the destination of the cars. That was a part of his duty. I do not know for sure whether he was supposed to keep a record of the property in the different cars for his own individual use or to turn it over to the Yard office, but I believe he did. His duties as Yard Clerk required him to be around among the cars in the yard on any part of the yard. I have seen him performing such duties in both ends and the center of the yards. I was in the service of the defendant company at the time Rosenbloom was killed. I was a switchman—what is called a field switchman at that time, that worked there in the yards. They
had a fireman and two switchmen, one followed the engine
123 and I was what is known as the field switchman and I stayed wherever it was necessary to release brakes and to hold cars and to make couplings and to do anything that is necessary in switching. My duties required me to be anywhere in the limits of the yards in Amarillo. Rosenbloom was run over near 5:55 P. M. It was in November or December—I am not sure about that. It was about the 19th day of the month. I cannot give the exact distance between tracks numbers four and five there opposite the Early Grain Elevator. Approximately I would say the distance was five feet. I have not seen any cars constructed the last two or three years with less than six feet to one hundred thousand capacity and coal cars and box cars and flat cars—I believe box cars are made of seventy thousand. I do not know exactly the capacity of a box car but there are

cars that clear eight feet inside, not counting the walls of the car. The average car, box cars, coal cars and ballast cars, to the best of my knowledge project six to ten inches over the ties—not over the rails, but over the ties. This would be from twenty-six to thirty inches over the rails. I saw Rosenbloom run over and killed. There was a train of cars on track No. 4 at the time. It was an outbound train leaving town and heading east. I never helped make up the train and never counted the cars but I think there were about forty cars. I would not swear that there were forty. That train was started out of the middle yards—the middle yards there where Rosenbloom was run over and killed. It was not that train that ran over Rosenbloom and killed him. It was a ballast car and
124 the tender of an engine on track No. 5. The car and engine on track No. 5 was moving east with the engine backing up. The engine was backing in the same direction the freight train on track No. 4 was leaving. I said that the ballast car was moving east from habit,—we call the directions there east and west. The engine and ballast car were moving north. We call that east. They were east bound but were really moving north. The ballast car and engine were moving in the same direction as the outgoing freight train on those tracks that run north and south. The train on Track No. 4 was headed north and the ballast car was also moving north. I was working with Engine No. 2209, an engine that was assigned to the yard work within the yard limits. I was on the extreme north end of the ballast car which was moving north, on the same car that ran over Rocenbloom. Charles Fullington was also assigned to that crew. He was riding on the footboard, between the ballast car and the north end of the tank of the engine. I was on the extreme north end of the ballast car on the left hand side, hanging on. John Walker was the engineer handling the engine. He was in the cab of the engine on the right side, handling the engine. He was supposed to be on the right side but the engine was backing up which made him on the left side. I was directly behind him. As the engine was backing up he was on the side of the track next to track 4, which would be to my left in my shape. I know who the fireman was. Have heard his name but do not now remember it. He was on the engine but I do not now remember in what position. I had occasion to look for him or give him a signal the last time
125 we started down into that track. The engine came in off the main track but I believe we coupled on to the ballast car on track No. 5. We had hold of this ballast car and had run it down to where Rosenbloom was run over and had hold of it then. I cannot say just where we coupled on to that car. I would like to state that in about ten hours we would handle many cars, and I do not remember just where we got that car, as there was nothing special about it to attract my attention. As we were backing down north on track No. 5 I saw M. A. Rosenbloom. I should say he was perhaps twenty car lengths ahead of us when I first saw him. A car length is about from thirty to forty feet. He was walking between tracks 4 and 5 and was walking north. His back was then turned towards our ballast car and switch engine. At the same

time I first saw Rosenbloom, the outgoing train on Track 4 was moving north. Rosenbloom seemed to be walking between the tracks and I could not tell whether he was taking the numbers of the cars or noticing the marks or what he was doing. I do not suppose there was a period of three seconds during that time that I did not see him. I continued to observe Rosenbloom from the time I first saw him until he was run over. I gave the engineer a slow-up signal as the car was backing down on Rosenbloom. At the time I gave this signal the ballast car was from four to five car lengths from Rosenbloom,—two hundred feet I should judge. I would say that the engine and ballast car were moving approximately five or six miles an hour—perhaps five. I will say five or six but I do not know. At the time I gave the slow-up signal the outgoing
126 freight train on track No. 4 was moving north on that track. It was right opposite Rosenbloom, or he was opposite the train that was on track No. 4. The outgoing freight train was moving eight to ten miles an hour at that time. Its speed was increasing as it pulled out. At the time I gave the engineer the slow-up signal Rosenbloom was walking down between tracks 4 and 5 by the side of the train that was leaving track 4. He was walking north. I would like to state here that as a switchman, I was required by the company to at all times be constantly on the alert for obstructions on the *train*, (?) such as stock or box cars, or cattle or men, or anything on the the track, and for that reason I was looking north. I was looking in the direction we were moving all the time from the time I gave the engineer the slow-up signal until the time Rosenbloom was struck. I saw Rosenbloom as we approached him. Rosenbloom did not look back during the time to my knowledge. He was walking between the two tracks and the moving train was on his left on track No. 4. Track No. 5 was on his right and when we got near, about twenty feet distant from *his*, he started to cross the track rather obliquely and I believe he took not exceeding two steps until the end of the car on which I was riding struck him, that is the car that was being pushed by engine 2209. The north end of the ballast car attached to the engine struck him in the back. He fell with his head across the west rail of track No. 5 and when we got stopped and when the engine finally stopped, after the ball-st car had passed over him, and the tender or
127 tank of the engine had passed over him, the wheel of the head end of the tank or the rear driver on the left hand side of the engine, was right up against his neck, just tightened up against his shoulder. He was instantly killed. His head was completely severed from his shoulders. It might have hung by a hair or so, or a ligament, but he never spoke or breathed that I know of after he was struck.

On cross-examination, he testified:

I was working as a field switchman, and as I stated a while ago that the rules of the Company required me to be diligent and to ride on the rear end all of the time we were moving,—we call it the head end when we are backing up. If the train was moving

forward I was at the head end and if it was moving backwards I was at the back end, but we call it the head end when we are backing up. The rules and requirements of the defendant company required this of me at all times and I did it. I did this to the best of my ability this particular time. I was riding on the end of the car because we were backing up and were to couple on to some more cars. I kept the best outlook I could. I did what I stated to the jury I did, to prevent the accident. I cannot answer the question as to what I left undone that could have been reasonably expected of me under the circumstances. In my judgment, I did not leave anything undone that I could do to have prevented the accident. I did the very best I could under the circumstances. It was not in my power to have done anything more. I always rode on wh- I
celled the head end of a train as it is backing up—
128 one furtherst from the engine. I was there more than I was at any other place and more time than I was not; if it was possible for me to be there I was there and I was there on this occasion. Mr. Rosenbloom was assistant yard clerk or bill clerk. It was his duty to go out when a train came in either over the Pecos & Northern Texas Railway Company's line or over the Southern Kansas Railway Company's line into the yard and take the initials and car numbers of the cars in the train and a record of the seals. To my knowledge, that was his duty and I have noticed men employed in that capacity and I think it is their duty. Those were what I understood to be Rosenbloom's duties at the time he was killed. When a train was leaving these yards and going out over either the Pecos & Northern Texas Company's line of road or that of the Southern Kansas Railway Company of Texas, it was his duty to go along and check up and take a record of the cars with their numbers and initials in the train and to make a record of the seals of each car. My understanding was that it was his duty after he had taken a record of that kind to report it and make a record to be kept on file in the office. He was performing that duty at the time he was killed. He appeared to be doing that kind of work or that kind of business at the time of the accident. I do not know what proportion of the freights we were handling at that time was what is called red-ball freight or fruit trains and stock and other dead freight. I do not know what was the destination of stock being handled at that time. We were handling through
some stock loaded along on the T. & P. in Texas
129 and in New Mexico going through to Kansas City, St. Joe and Chicago. The spring shipments would be going to Kansas and to feeders in Illinois and Missouri, as I understood. I do not know the contents of the cars in the train moving out on track 4 at the time of the accident. Could not tell the contents of a single car. Do not know whether or not that train was made up in the yards there nor how long it had been there. My switch crew did not make it up as I know of. They may have handled some of the cars but did not put the train together. I do not know where the cars were going. Would not recognize a list of the cars. All I know is that it was a train pulling out going east, as we call it in railroad parlance, but really more nearly north, at the time of the

accident. I had formerly worked running trains and had often run on trains going out from Amarillo over the joint track from Amarillo to Washburn and thence over the Southern Kansas track. In going toward Panhandle we call it going east. I had been working with freight trains sometime prior to this accident. I do not know whether I was working for the Eastern Railway Company of New Mexico at the time or not. Do not remember the maker of the check I was paid with because when I got a check I looked at it to see if the amount was right and then used it. Took no note of anything else about it. I know that I was employed by men we refer to here as Santa Fe officials. Formerly I was working under W. D. Garwood, Superintendent. He was here at that time but is not here now. He was not here at the time of the accident. He was my immediate superior when I was working in the train
130 service. When I was employed to work on the yards, I was employed by Mr. Hoffer, Yardmaster. I was employed by Smyer and did not have to make a new appli-ation, but was under Hoffer. My understanding is that Mr. Smyer was Trainmaster and had charge of transportation over the Southern Kansas and the Pecos & Northern Texas but I could not say under oath that he did or did not. I never did measure the width of those sidings where Rosenbloom was killed. I do not -now how wide the distance is between the two rails. That is from the east rail of track No. 4 to the west rail of track No. 5, nor do I know the exact distance between the rails of either of these tracks. My judgment is that they are all about four feet apart. I think the correct measurement is perhaps over four feet—perhaps four feet and eight inches, but do not know exactly. I never did measure the distance there between tracks 4 and 5 where Rosenbloom was killed. All I can state as to this is to give you my general estimate of the approximate distance. I cannot recall that it is exactly seven feet from rail to rail. I never was in the track department and do not know the exact distance. I know that a cross tie is eight feet, at least I have always understood that. I never measured one and never made any. I do not know how far the tie extends beyond the rail. I never measured the width of any of the cars in a train but estimate their width from hanging on the side of them to protect myself against other things. I cannot undertake to state the exact width of cars or the space between the trains if two were standing side by side on tracks 4 and 5. I cannot reduce it to exact inches. There was more space between the main track and siding No. 1 than there was between the different side tracks. I cannot say whether
131 the sidings are of uniform distance from each other or not. I have passed frequently. There is a space there that a man can pass up and down between the tracks with trains standing on them. Rosenbloom had been working there on those yards some days—I would say some weeks but I do not know how long. I had seen him there in the yards frequently and he had very frequently taken the car numbers and checked the seals and done work of that kind. I saw him doing that kind of work. On this occasion I saw him in the yards and between those two tracks in the yards as I have told you about. When I first saw Rosenbloom at the time

in question he was north of the caboose on the train that was moving out on track 4. I could not say where he was with reference to the engine on that train. When I first saw him he was something like fifteen or twenty cars from the end of the train that was moving out on track 4. I could not estimate the distance he was from the caboose of the train at the time I first saw him but he was at the side of that train. At the time I first saw Mr. Rosenbloom I was on the extreme north end and at the west side of a ballast car that we were pushing. I never had any occasion to notice where the caboose was with reference to that car at that time. I had rather testify that the caboose was south of me than that it was north at the first time I saw Rosenbloom but I am not certain. I cannot tell you where the caboose was when I first saw him. When I first saw Rosenbloom the caboose to the train on track 4 was north of me. It was south of Rosenbloom and he was walking down
132 the track at the time I first saw him. He was on the east side of track No. 4 by the side of the train on that track, somewhere north of the caboose and south of the engine, but I cannot and would not attempt to approximate the distance from the caboose or engine. The outgoing train was going about eight miles an hour in my judgment. The speed of a train is hard to get at accurately and I would like to make my statement that it was going from eight to ten and not to exceed ten miles an hour at the time. We were going I do not believe to exceed six miles an hour, say about six miles an hour, at the time in question. We were going about that speed when I saw Rosenbloom and if we had decreased or changed our speed I do not remember it. I was unable to detect any increase in our speed. If we increased it or decreased it at the time this car hit him I did not notice it. My belief in the matter is that we had not decreased our speed at all at the time we hit Rosenbloom. The engineer gave one blast of his whistle. If the engineer slowed down I did not notice it. At the time the ballast car struck Rosenbloom when the wheels ran over the body and dropped off his body, I got off the car over against track 4 and the caboose on track 4 was just passing, just barely clearing as I got over. If you and the court can figure the time I would take for me to jump from the steps to track 4 and the caboose just passed at that time, you can tell the relative time of the accident and the time of the passing of the caboose. I did not get off the car before it hit Rosenbloom. A part of the trucks on the north end of the ballast car had not more than passed over Rosenbloom a very
133 few feet, if any, when I was over on Track 4. I got off as quick as I could. I was hanging on the side of the car. My feet were in the stirrup on the car and I was holding on. I was up in the body of the car at the north end when I gave the engineer a slow-up signal. I then commenced getting down. This was after I saw Rosenbloom. On each end of the cars in service now, or rather then, there is a platform extending out from the main body of the car and I was standing up on that platform and when I gave the slow-up signal I got down off the platform on to the stirrup and was holding on to the grab iron. I had climbed from this platform down and was standing with my foot in the stirrup and holding the

grab iron after I gave the slow-up signal before we struck Rosenbloom. It was about ten car lengths from where Rosenbloom was struck where we expected to couple on to the other cars. I would say about four hundred feet, counting the cars at forty feet. That is approximately the distance. I did not count the car lengths but am only estimating or approximating the distance from looking down toward the cars. We had gone in on Track 5 and had run down there to couple on to these cars and pull them out. It is a fact that we had run in on track 5 and coupled on to this ballast car further on south and was pushing it down there to couple to the other cars and pull it out. We had not coupled the hose so there was no air connection between the engine and the ballast car. We expected to pull the coal cars out on to another track and then set the ballast car back on this track. It was coal cars that we were taking out. I said if Rosenbloom ever looked back I never saw him. I was continuously looking at him so that I could detect every motion of his head or every motion he made. I never had
134 that in view as my object. I hollered at Rosenbloom when we were about five car lengths from him. I do not remember having hollered at him when we were about fifty feet away. My recollection is that it was four or five car lengths from me to him at the time I hollered at him. I hollered at him one time. I do not think I hollered at him when I was fifty feet from him. If I hollered at him within fifty feet I do not remember it. I stated that I gave a signal to the engineer within four or five car lengths from Rosenbloom. I did not give him a signal within fifty feet. I do not remember giving a signal at that distance. The engine did not slow down when I gave the signal. At the time I hollered at Rosenbloom he first walked near the moving train on track 4 and that led me to believe he knew we were approaching and then he moved near the center between the two tracks—that is my recollection of the matter—and then he started across the track and got caught. It was after I hollered at him that he moved near the train passing on track 4. As I stated he was moving near the moving train and then when he seemed to be near track 4 I hollered and gave the slow-up signal. I do not think he moved nearer track 4 immediately after I hollered. I do not remember his having moved in either direction to lead me to believe which way he was going. As I have already stated, if the engineer slowed down the train at all I didn't detect it. The engineer gave four blasts of his whistle about fifteen or twenty feet from the man we hit. I do not think he ever gave it before that time. If he gave it before that I did not
135 hear it. I cannot testify as to that point. We were not at the time slowing down to couple on to the coal car. The only way I have of answering this question as to speed is to say that if he decreased the speed any I could not tell it. I have no way of measuring the speed accurately. I do not remember noticing any land marks or anything else. Mr. Rosenbloom was a little nearer track 5 than he was track 4 when the whistle sounded. He was at the end of the ties walking obliquely across track 5. It is my positive recollection that the whistle blowing was simultaneous with the time that the car struck him. That is my positive recollection to

the best of my knowledge and recollection as to the way it happened. I do not intend to testify to something that is not certain. I am sure—almost sure—that the car struck Rosenbloom at the same moment the whistle was sounded. Maybe there was a slight difference of time. He did not travel any distance at all to speak of after the whistle sounded until the train struck him. At the time you mention he was starting across the track, that is the time when the engineer first sounded four blasts, when the last sound came out, right at the last sound, he was struck. There was a very short time elapsed between the last blast of the whistle and the time Rosenbloom was struck with the car. It would be almost impossible for the engineer to make four blasts of his whistle at the same instant. The accident happened in daylight. Rosenbloom was walking along between the tracks, neither fast nor extra slow. I did not understand that at the time I hollered at him that he heard. It is not a fact that just after I hollered he moved next to the car and
136 it led me to believe that he heard me. The Claim Agent or some one connected with the Claim Office Department came to my room and got me to sign a statement and I do not know whether I made a statement in writing to the effect that just after I hollered Rosenbloom moved over next to the cars in the train on track 4, which led me to believe that he heard me at the time. I have no way of knowing whether or not it is a fact that when Rosenbloom started across the track as soon as he turned to go across that the engineer put the emergency brakes on. At the time we struck Rosenbloom I do not know that the engine was reversed, but he proceeded to stop as quick as he could. I have not seen any statement of the engineer made there on the ground at the time of the accident about his reversing the engine. The engineer never made such statement there in my hearing. I do not know whether or not Mr. Rosenbloom could have seen me if he had looked back. I do not know about that. It was daylight. There were no obstructions between him and either end of the car and the engine, except the moving train on track 4. Directly back there was no obstruction. The two tracks were straight and parallel. There was nothing between Rosenbloom and the ballast car on which I was riding. There was no obstruction at all. It was daylight. I could have seen all the time the full length of the switch line. I do *now* know whether I could see him back of the time we picked up the ballast car or not. I signed a statement that another man made but I was sick in bed and did not read it and do not know whether I made the statement that Rosenbloom could see back fifty car lengths
137 or not. There was nothing to obscure the view from me to Rosenbloom but as to fifty car lengths, I do not know, because we were not that far. When I signed the statement I came out of the room into the front room for the purpose of meeting the gentleman. The statement was written down there in the room at the time in my presence. I guess I read over a part of it. I do not know that I read all of it. This is my signature signed to the statement which you show me. (The witness is here asked to read and reads a part of the statement pointed out to him by counsel.) Well that statement "When I was within about fifty feet of Mr. Rosen-

bloom I hollered at him and signalled the engineer to slow down" is in that signed statement over my signature but written in another man's handwriting. That is the statement was written by another man but signed by me. It is a pretty hard thing to do for me to state whether or not I made that statement. I am not capable of doing it. I read in this statement over my signature, the words "When I hollered Rosenbloom seemed to mover nearer to the passing train, the engineer slowed down to about four or five miles per hour and gave a warning signal with his whistle." I did not dictate such a statement. I do not have any recollection of having made that statement to be copied and signed by me. The statement is contained in the written statement you showed me over my signature.

The witness is here shown a written statement signed by him and reads therefrom the following:

"Within just a few seconds after the whistle was sounded
138 Rosenbloom without looking back, stepped on to our track just a few feet in front of us, having only taken one long step obliquely on the track when the draw head struck him."

He testifies with reference to this statement as follows:

My statement there to Mr. Miller was the same as I have heretofore made, that it was nearly the same time that he stepped on to the track that the train struck him—just a second or two difference. Yes I made that statement which you read from the written statement signed by me. It is made over my signature. I made the following statement to Mr. Miller and it is contained in this writing above my signature, to-wit: "The way car of the train on track 4 was just passing when we struck Rosenbloom." These words are in that statement I signed. I cannot deny having made that statement to Mr. Miller because it is there over my signature. I cannot recall whether or not I made any of the statements contained in that written statement in the same words as are there written down, but I signed that written statement after it was written by Mr. Miller and these quotations you read therefrom are contained in that written statement. I cannot tell whether or not I said to Mr. Miller: "Mr. Rosenbloom was walking along leisurely and rather unconcerned, with his hat thrown back on his head" or not, but it is contained in that statement which I signed. Those statements are all in Mr. Miller's handwriting but over my signature. I remember stating to Mr. Miller that Rosenbloom did not look back and I made the statement to Mr. Miller that "I could not say that he ever heard my warning as he did not look back," though I supposed he did by his moving close to the other train. I do not
139 remember that I stated to Mr. Miller that "as soon as he started across the track the engineer put the air in emergency and also told me that the engine was reversed"; but such statement is there in the written statement over my signature. When Rosenbloom was struck he fell the same direction the car was moving—face down, with his head across the rail. His head was across the west rail of track 5. He fell with his legs and body on the inside between the rails of track 5. When the engine stopped his body was on the outside. I did not see the body get outside of the rail.

I was no more excited then than a man would be when another is getting killed. I do not think that the circumstances were such as that excited me. I was nervous. When the train stopped the head was cut off of his body and the rear driver of the engine was right against his shoulder. The only mangling of the body was his head and shoulders. He was cut through his shoulders and the only mangling I remember was his shoulders. Nothing about his feet or his body was in any way mangled or mashed that I know of. I am not working for the railroad now. Am not employed by the railway companies at all. I have charge of the circulation of the Daily Panhandle. I ceased to work for the railway companies January 5th of this year. I was discharged. I have talked with plaintiffs' counsel quite frequently about this case since I was discharged. No, I have not talked with them quite frequently. Have not talked with them any more than when I was asked about it. I should say I have talked with them two or three times. There was no exchange of facts or anything like that given in the conversations. I
140 talked about the facts. I was asked if I saw the accident. As I have stated to you, I talked with them a time or two about this case but I have never given them any full statement of facts or details of the facts. Mr. Ryburn, one of the attorneys for defendant, called at the office one afternoon and stated to me that Madden or Trulove or some one wished to talk to me about this case. I do not remember his having spoken to me only on the one occasion but I do remember his having approached me here and he stopped me as I came in the court house. I believe he said something to the effect that he did not wish to interfere with my work during work hours and asked me to call when off duty so defendant's attorneys could have a conversation with me. It seems to me that I told him that I would be over to the office of defendant's attorneys to talk the matter over. I believe I told him that if my work would permit I would be up there that afternoon and talk the matter over. I did not go. No one else ever talked to me about coming up there to talk the matter over with defendant's attorneys. I believe my father mentioned the matter to me—either my father or brother. I dropped in there at their office and I think it was my brother who told me that one of defendant's attorneys had been there to see me, thinking I was in my father's office and said that he referred him to me. Perhaps he spoke to me afterwards about it. I never after that time went around to see defendant's attorneys. I never talked to defendant's attorneys at all after giving the signed statement in writing which you exhibited here and from which I have been reading statements. I never told them
141 anything more until this morning. I talked with them a little while in the room here in the court house before being called as a witness in this trial. That is the first detailed conversation I have ever had with defendant's attorneys about the case.

On redirect examination, the witness testified as follows:

I had a consultation with some of counsel for plaintiff or defendant while I was in the service of defendant. I talked with both

Cooper and Stanford while I was yet working for the defendant. I detailed all I knew about the case to them then. I believe I gave a fuller statement then than I have since. I entered the train service in 1900 and was continuously in the train service with very short intermission, down until January of this year. I have spent about two and one-half years in the switching department after I signed up for yard work. My recollection is that I had went to work in this particular yard where the accident occurred about the 20th day of June, and this accident occurred in November. This was the second time I had been employed by the Santa Fe System Lines. There was noise necessarily accompanying the movement of freight trains like the one that was running out on track 4 during this accident and the engine with car attached at the time moving on track No. 5. It was possible for a man walking along by moving train to hear another train moving back on him. I think it is probable that he would have heard it. Yes sir, I stated that
142 Rosenbloom never within my knowledge looked back from the time I first hollered at him until he was struck. The fact that I have quit the service of the defendant company does not affect my testimony. I was in the service of the company at the time I made the written statement that has been exhibited to me here and that I have read from and been interrogated about by defendant's counsel. Yes sir, I have stated to defendant's counsel that at one time Rosenbloom was nearer the freight train, then began to move closer to the track on which the ballast car was. He began to move over next to track 5 about the time I hollered at him. He was four of five car lengths ahead of us. At the time I signed this written statement, I was at home in bed. The day before I signed it my wife answered a telephone call at home and they requested that I come down. It seemed to me that they wanted to make a report or statement and it was the day before, or perhaps two or three days before, I signed the statement that I did sign. I do not remember just how long I was confined to my bed, but I answered them, or sent word, that I would be glad to see them or any of them that would call at the house and they did call. Mr. Miller is the man I believe that called and I left my room and went out into the room where there was a fire and talked to him. He wrote the statement and I believe he asked me if I wanted to read it over. I glanced over it and signed it. Perhaps some of it I read and some of it I did not. That is my recollection because I did not feel well and wanted to get out. I did not feel like making any statement. In my judgment, Rosenbloom was going
143 nearer to track 5 until the time he started to cross it. At the time he started to cross he could not have been over two steps—maybe one—over the rail and a short step inside of the rail until we hit him. The front end of the ballast car was about twenty feet from him at the time he started across the track. I do not think the engineer sounded the whistle until we were nearer to Rosenbloom than that. It was after that time that he began to sound his whistle. There were four blasts of the whistle. I never heard it except on that one occasion. I never heard it but one time

in connection with the accident or near the time of this accident. Rosenbloom was not to exceed twenty feet from the north end of the ballast car when the first blast of the whistle sounded. He was getting nearer track 5 at the time the first blast of the whistle sounded. I believe he was near enough to track 5 for the corner of the car to have struck him. At the time the first sound of the whistle sounded he had started across track 5 nearer the west rail than he was to the middle line between the tracks and he was moving away from track 4. I believe a man could have sounded four blasts of the whistle in a few seconds. I will say three seconds. My best recollection as to the time consumed in sounding the four blasts of the whistle, I will say is five seconds. I said a while ago that there was just a very short period of time elapsed between the last sound of the whistle and the time the ballast car struck Rosenbloom. No one hollered at Mr. Rosenbloom just at this time, just at the time the ballast car ran down on him. The air of the ballast
144 car was not in working order. The air was not coupled onto the ballast car. There were brakes to the engine and tender. There was an air brake on the engine but I cannot say whether or not it was working on the tender. I know there was an air connection on the tender. The engine was what they call a six wheel engine. The ballast car was empty. The engine and car ran the length of the ballast car and the tender and the space between the tender and the rear wheels of the engine, after striking Rosenbloom. I will say it is fifty-five or sixty feet. I ran about sixty feet—that is my idea. I think that is the length of the car and the tank and all. I had been working with that particular engine right along. It worked a double shift day and night and I had been entitled to day work then about thirty days and I had been on that engine without the loss of a single day. I had been working with Engineer Walker during the time that I had been assigned to that engine, which I think was about thirty days. I have seen him make quick stops during the time I was working with him. Have seen him make quick stops on tracks similar to the track where the accident happened. I have seen him stop within ten or twelve feet when running 5 to 6 miles per hour on similar track. The first road crossing north of where the accident happened is at Tenth street, which was in the neighborhood of four blocks from where the accident occurred. A block is three hundred feet. It was not the intention of the crew to run this engine across Tenth street at that time. We were not intending to go further than the cars in front of us, which were nowhere near Tenth street. We were not
145 going to Tenth street at all.

On recross examination, the witness testified as follows:

We were going in there on track 5, pull out this coal car and set it out on the coal track, but I do not remember what disposition we were going to make of the ballast car. We had been switching around there pretty well all day. Cars were moving back and forth on those tracks pretty well all the time during the day. It was a common thing there in the railroad yards. I suppose that the other employees around there about the yards knew that there was switch-

ing going on there all the time day and night and that the cars were constantly passing up and down on these switch tracks. The best I remember, we came over from the yards south of there at the time we were coming in on this track 5. I am not positive about that but think we came from the yards above the office. There are four or five series of tracks in the yards there. We had covered all these yards several times during the day. We were around about over the yards during the whole day and were busy all the time. We were there the day before and our duties were pretty much the same every day. We were there every day that month and had been. The night crew worked at night and we had work during the day. There was switching being done all the time. That is what the switch yards are there for. Everybody around the yards and around the round-house and offices should be cognizant of those facts. Four blasts of the whistle is a regular road crossing alarm whistle. I think it is what is used for an alarm whistle. I saw Mr.
146 Walker stop this particular engine. I saw him stop within ten to twelve feet—when running from 5 to 6 miles per hour on a similar track, not one time but several times. In approaching switches, I have seen him do that. A man running a switch engine is supposed to work strictly by signals. It is his duty to ride the way you are going to prevent running over a switch or butting into a car too hard and he must look the way he is going all the time. I cannot give the date and place that he ever stopped in twelve feet. I would not attempt to do it. I cannot name who all were present. I would say other switchmen. I think I was one and Mr. Fullington another. I do not know that Mr. Fullington was present any more than he was the other man working with this crew and this is why I say he was present. It is absolutely impossible for any man to set the time and place and I cannot state who has been in the train service without I had occasion to notice it. I said he could stop an engine in twelve feet but I did not say that he could stop a train. I have seen him stop an engine and one car but I cannot give the dates and places of such things, such an ordinary thing as a stop, I cannot do that. There are some classes of engines that a man can stop in five feet, going six miles an hour. I believe 2209 is one of that class. It was the regular switch engine and equipped with air brakes. I cannot tell you the place where I saw such stops made, cannot do that. Cannot name the date or location. Cannot do anything of the kind. We were not accustomed to or required to couple up the air to an engine when we were going to switch
147 a car a short distance. We were never required or accustomed to do this unless we were going to carry the car some place where it would be dangerous. In doing common switching about the yards, we were not required and it was not a custom to couple onto the air. We did not do it upon this occasion. We were not going to use the car but simply to shove it down to the coal cars, couple on to them and pull them out. I do not know what we were going to do with the car after we got through pulling the coal car out. Mr. Fullington was riding the foot-board of the tender to the engine. There is where he stated to me he was and where I saw

him last. That is where I last noticed him before we struck this man. I hollered at the man before the whistle blew. That is my recollection. Mr. Miller did not talk to me about the facts when he came to get this statement. He just introduced himself to me there at the house and told me his business and got a statement from me. He asked me to state the facts and I told him what the facts were and he wrote out the statement but I am unable to state what the words were that I used in giving him the statement. I related to him the facts. I do not know whether I told him to write them down or not but when I was talking to him he proceeded to write something. Some of the time he was talking to me while he was writing, perhaps all the time. He did not ask me to state anything or to sign anything that was not a fact. If he had I would not have done so. I told you this morning that I did not know the number of cars in the train on track 4 when you pressed me to approximate it I said perhaps there were forty but I do not know where
148 the engine was. I do not know whether it had made the curve or whether it was still in line with the train. There is a curve—sort of a curve coming out a little from the main line. I have not talked to anyone about this case during the noon hour—nobody at all—not a word. I talked to Mr. Stanford about a second—not exactly connected with the case. No one talked to me after I left the witness stand before noon until I came back after noon but Judge Stanford.

On redirect examination, he testified further:

I do not know whether there was a card or pasteboard in Mr. Rosenbloom's hand at the time he was killed or not.

Mrs. M. A. ROSENBLOOM testified for the plaintiff as follows:

Mr. M. A. Rosenbloom, the deceased, was my husband. He was killed on the 27th day of November last. Minnie Rosenbloom and Isaac Rosenbloom are his father and mother. M. A. Rosenbloom and I were married the 13th day of May, 1907. I have two children. Milton is two years old in May last. The other one will be nine months old the 31st day of this month. Her name is Matilda. The older one's name is Milton and the younger one Matilda. Matilda was unborn at the time of the death of M. A. Rosenbloom. Was born five weeks after his death. Minnie and Isaac, father and mother of M. A. Rosenbloom, reside in Brooklyn, New York. His father is between fifty and fifty-five and his mother is about
149 fifty years of age. I was married in Brooklyn, New York. M. A. Rosenbloom was twenty-six years old in August before he was killed in November. He had a common school education, gotten in New York city. He went through school and then a high school and he was bookkeeper and cashier in New York the last position he had. He worked there two years and I have his references. We came to Oklahoma the day after we were married. Have been in Texas and Oklahoma since that time. Mr. Rosenbloom was never sick since I knew him. Have known him for five years. He was always healthy and never had a sick day since I

knew him. That is all I can tell about it. I never heard of Mr. Rosenbloom saying a curse word or getting drunk. He only went to the Lodge and he stayed at home at nights and he never gambled and did not know what a card was and never drank. He never went out at night. He took good care of me. All the money he made he gave to me. He just took what he needed and he did not need much. He never did spend any money on the outside except for tobacco. He would give me the money he made at the end of the month and I would save what I could and he would send it to his mother. He managed to send home every month on an average sometimes five and sometimes ten and sometimes fifteen dollars. Most of the time he would send fifteen dollars. He made eighty-five dollars a month. When we came to Oklahoma he was working for a construction company. After we came to Texas he worked in Canadian, Texas. He worked for Gerlach Mercantile Company. He worked as cashier and bookkeeper. He started to work for the defendant company on the first day of November and was killed on the 27th. This was 1909. He was getting sixty dollars a month working for the defendant company. I saw him after they brought him home before they took him off Sunday night. I could not see his injuries. All I could see was his head. It was all scratched up.

On cross-examination she testified as follows:

On an average, Mr. Rosenbloom sent his father and mother ten dollars a month. He did not send that to them from his salary gotten from the defendant company. I got the money. He had not drawn any salary from the defendant company at the time he was killed. He had not sent ten dollars a month right before this time. It was in October—I do not remember the date exactly. He was not then working *on* the railroad company. We came to Amarillo about two and one half years ago and I lived here about six or seven months and then went down to Miami, Texas, and then came back here again. We stayed at Miami about a year and a half. Came back and took this position on the 30th of October. He was in business for himself at Miami. Didn't work for Gerlach there. He quit that business for himself and came back up here and went to work at sixty dollars a month. He worked for Gerlach when we first came to Texas. That was at Canadian, Texas. Worked there just one month before we came to Amarillo the first time. When we were here at Amarillo the first time I believe Mr. Rosenbloom worked for the Santa Fe in the general offices. Do not know exactly how long he worked. About three or four months and then went back to Miami. I think he was getting seventy-five dollars a month but do not know for certain. Cannot tell whose department he was working in but know he was doing inside work. It was indoors work in the general offices. We had card parties at our house at home and he never played because he did not know how. That is why I said he did not know one card from another.

On redirect examination, the witness testified as follows:

When he worked in the general offices he got seventy-five dollars a month. When he came here and took this place on the first of November before his death, he began to work at sixty dollars per month. This card you hand me was brought to my house with Mr. Rosenbloom's coat but I do not remember who brought it. It was brought from the offices where they were working.

A. M. BRILES testified for plaintiff- as follows:

I have lived here about a year. I have had about five or six years' experience running an engine. Have run both on the road and in the yard. I have worked for the lines composing the Santa Fe System. I have worked for them here in Amarillo. I never run an engine here in the yard at Amarillo but run on the road in and out of Amarillo. I know the styles of engines used on this road. I have had experience running the same styles of engines. I think I know them all pretty well. They have quite a collection of engines. They have five or six different kinds. If an engine is running backwards, it can stop as quickly as running forward. I have had experience in stopping engines equipped with Westinghouse brakes. If the brakes are in good condition, ought to stop an engine with one empty car attached six or eight feet

152 On cross-examination, the witness testified as follows:

I was on the jury list yesterday and qualified as a juror in this case and was a competent juror to sit in trial of this case. I used to work for the defendant and for the roads composing the Santa Fe System. I got discharged. I a mwhat you would call a discharged employee. Have not been heretofore engaged in working up cases against the companies. It is not a fact that I make it a business to go around where there has been an accident and solicit injured persons to bring suits against the road for different firms of attorneys.

On redirect examination, he testified as follows:

I work in the auto shop over here now. I take care of the automobile shop at present. It is the house just across the street here that I work in—Mr. Herrick's place.

PAT STEWART testified for plaintiff- as follows:

I ran an engine five or six years and fired one about three years and took a course in the Scranton Schools and have a diploma. Have had experience running engines equipped with Westinghouse air brakes, with both New York and Westinghouse. I can tell you by having the conditions, within what space an engine switching one empty ballast car, moving at the rate of five or six miles an hour, on a level track, ought to be stopped by the use of all means at command. If the rails are dry they would stop about five
153 feet under ordinary circumstances. They could stop as quick as the wheels would stop. If the engine is equipped with

Westinghouse brakes and moving five or six miles an hour, they will stop instantly as soon as the air is applied.

On cross-examination, he testified as follows:

It has been about five years since I ran an engine—four and a half or five years. I have been in the hotel business since. I ran on the Rock Island before that time. Well, I was pulled off of my run for an investigation. There was supposed to have been air on the train and there was none. I was pulled off for an investigation. Have not been running on a railroad since that. I quit because I did not go to the investigation.

Plaintiff- next introduced American Tables of Mortality, showing that a person twenty-six years old had a life expectancy of forty-one years. These mortality tables had previously been shown to be standard mortality tables by the testimony of W. B. Patterson, who had qualified as an insurance man.

Plaintiff- rests.

Defendant's Testimony.

J. L. WALKER testified for the defendant as follows:

I live at 400 Houston street, in the City of Amarillo, Texas, and have lived in Amarillo since 1902. I am a locomotive en-
154 gineer employed by the defendant, The Pecos and Northern Texas Railway Company. I have been working for the defendant company since November, 1904. I worked before that as engineer about two years.

I was working for the defendant in November, 1909. At that time I was running a switch engine on the yards here in Amarillo. I remember the occasion of the death of M. A. Rosenbloom. I was working on the switch engine in the yards here in Amarillo at that time. The engine was number 2209. There was attached to that engine at the time of the accident one empty ballast car.

I am familiar with the yards of the defendant Company in Amarillo; have been working in them ever since they were built. The tracks on the yards where Rosenbloom was killed run almost north and south. The yard tracks are on the east side of the main line track. There were seven tracks in this yard where he was killed at the time of the accident. They are designated by numbers from one to seven, number one being next to the main line track, number two next to number one, number three next to number two, and so on. The main line track is not numbered. It is from ten to twenty feet from the main line track to the first yard track, but I never measured so as to know the exact distance apart these side tracks are.

At the time of this accident I was running the engine and one ballast car East, as we call it, but really nearly north. I was back-
155 ing up and was pushing an empty ballast car. We were going in on track number five to get some coal cars, and were going to take the coal out and put this ballast car away.

The accident happened about 5:30 in the evening. We were on track number five at the time of the accident. At the same time there was a train pulling out on track number four, leaving to go East over the Southern Kansas line to Waynoka.

I blew the whistle as we were coming down track number five before we reached and ran over Rosenbloom. The bell was ringing before this time. I gave four blasts of the whistle about seven or eight car lengths from where we ran over this man. The four blasts the way I blew them is the crossing signal. I blew two long blasts and two short ones. That is the road crossing or curve whistle used to give warning. I saw Rosenbloom prior to the time I sounded the whistle. I saw him when we started in on this track. I saw him before I blew the whistle and when we started upon the track. He was walking along between the tracks numbered four and five, along by the freight train which was pulling out of town. He was probably seven or eight car lengths ahead of me when I blew the whistle. There was no public road or anything of the kind there. There is no crossing until you get up to Tenth street. It was simply out on the yards. It was about fifty car lengths from where the accident happened up to the crossing.

I saw Rosenbloom after blowing the whistle the four blasts. He was walking down the tracks and when I blew the whistle at him he looked around and then walked on down the track, and when we were probably something like ten or fifteen feet from him—I can't tell the exact distance but we were right near to him—he started right across our track in front of the ballast car.
156 That is the last time I saw him until his body came back.

When he started across the track he just moved like he was going diagonally across the track. When he started across the track I put the air on and put the engine over and pulled her wide open. I mean I pulled the throttle wide open and reversed the engine so as to put it in forward motion which made the engine try to go the other way. I put her in forward motion and gave her speed. If I had not locked the wheels that would have turned the train the other way. The wheels would have turned the other way whether she went the other way or not. I did this when I saw Rosenbloom start across our track some ten or fifteen feet ahead of us.

I was going down the track at the time to get some coal cars in there. I had slowed down before Rosenbloom started across the track ahead of us. I had the air set when I blew the whistle at him and I released it then and was going to let the engine roll on down, figuring that I would have to stop to make the coupling on the car, and intending for it to come to a stop at the coal cars. When I got stopped I was within three or four car lengths of the coal cars.

On cross-examination, he testified as follows:

The yards are known as the Pecos & Northern Texas Railroad Company yards. Some call them the Santa Fe yards. They call the whole system the Santa Fe System because they have a controlling interest in them. They call the Eastern Railway Company of New Mexico, the defendant Company, and the Southern
157 Kansas Railway Company, all of them—the Santa Fe System.

I don't know who owns the road from Amarillo to Texico. They have got the name of the Pecos and Northern Texas Railroad Company up on the depot. I guess that Company has an interest in the road between Amarillo and Texico. That is as far as I know. I don't know whether the yards belong to the Pecos and Northern Texas Railroad Company, or the Eastern Railway Company of New Mexico. I never made any inquiries about that.

I was working at the time for the Pecos and Northern Texas Railway Company, and Rosenbloom was working for the Pecos and Northern Texas Railway Company. At that time I was working under the instructions of the engine foreman. Mr. W. F. Roe was foreman over that engine Number 2209. Mr. Thomas Booth hired me for that position. He was Master Mechanic. I went to work under him when I went to running a switch engine for the defendant Company in Amarillo. I have been running a switch engine here in the yards at Amarillo a little over three years and nine months.

I saw Mr. Rosenbloom when he started across that track in front of that ballast car. I believe he was closer the ballast car than twenty feet—think he was only about ten or fifteen feet from the car when he started across the street ahead of us.

I blew the whistle the four blasts when I saw him seven or eight car lengths ahead of the ballast car. That was about two hundred and eighty feet—might say three hundred feet. I stated that I whistled the road crossing whistle but I didn't whistle for a public road crossing. I whistled that whistle but I was not whis-
158 ling then because there was a road, because there was no road crossing there. That is all the whistling I did.

At the time I saw Rosenbloom start across the track ahead of the ballast car we were going somewhere between five and seven miles an hour, as well as I can judge—that is about as close as I can come to the speed.

It was dry cold weather and this track had not been used for a while and they were slick like they always are in the winter time. They get slick in cold weather. The track gets slick and we call it frost on the tracks. The track and rails get in such shape that you can hardly get over them. I don't know whether it is frost on them or not, or what it is.

It was a cloudy day, but it had not rained up to that time. It rained a little while after the accident—it rained a little bit just after that. Prior to the accident it had not even sprinkled as I remember of—up to the time Rosenbloom was killed it had not even sprinkled as I recall. There was no ice at all on the track but the track will get slick in cold weather whether there is ice on it or not.

The track there had not been used, or anything been over it for four or five hours, with the exception of the coal. It came in on the head of a train.

The wheels of the engine certainly did slip when I applied the emergency brake. The engine and car moved probably sixty feet after striking Rosenbloom. The ballast car went over him and the

159 tender of the engine went over him. None of the engine proper went over him—never a wheel of the engine went over him. The rear driver of the engine got up to him but did not run over him. It is probably eight or ten feet, I guess, from the end of the tender to the rear driver of the engine. The ballast car was about forty feet long, and the tender was about eighteen feet long. That would make it about fifty-five feet from the ballast car—the end of the ballast car to the engine. It is about eight or ten feet from the rear engine wheel or driver to the end of the tender. We ran something like fifty-eight feet after we struck Rosenbloom. Then, we lacked something like ten or fifteen feet of being to him when he started to go across the track ahead of us. We ran about sixty-eight feet after I saw him start across the track in front of us until we stopped.

It takes some little time to stop an engine—to make application of the air and reverse, and a little time for the air to take hold, and it took time for me to put the engine over. You can't stop an engine like that right on the spot—you have to take a little time to do that.

No, sir, you could not stop an engine like that on the track like it was, with a ballast car attached, running five to seven miles an hour, in sixty-eight feet. I done all I could to stop it. I certainly tried to stop it.

I saw Mr. Rosenbloom from the time I sounded the whistle, some seven or eight car lengths from him up until the time he started across the track ahead of us. I saw him down the track ahead of us just as I see men that way every day and go right on by them.

160 No, sir, I didn't know that if I pushed that ballast car down on Rosenbloom, with this freight train moving out on the other track—track number four—without his being apprised of that fact, that he would be placed in great danger. There was plenty room for a man to get out of the way. If I had known he was going to cross the track I would have stopped and waited until he got out on the side.

The space is more than three feet when there is a freight train on track five and a train on track four, between the cars of the two trains. The space is over four feet. Yes, sir, I mean to tell the jury that with a long freight train pulling out on track four, when I saw Rosenbloom he was walking along in the same direction that that train was going. He was not looking up at the sides like he was taking the numbers of the cars. He was walking along there by the side of the train but he was not looking up at the cars. There was no danger in running the ballast car and engine down on track five with a train moving out on track four, if a man would stay out of the way. I did not run on him unexpectedly. I blew the whistle at him and he looked around. He knew I was coming. If I had gone down without warning him and come on to him unexpectedly he would have been liable to have become confused and been in a dangerous position, but I didn't do that. I warned him and so did the fireman, that we were coming. I warned him by blowing the whistle when we were seven or eight car lengths away, and the fire-

man was giving him warning with the bell. These were all the warnings we gave.

When I saw Rosenbloom start across the track in front of the ballast car I knew that he was in imminent danger and I commenced to try to stop. The air brake is right to the side of me on the boiler and it is nothing in the world but a short lever;
161 that is, what we get hold of. That is quite a lot of machinery to an air brake. The part that applied the air to the engine and accomplishes its purpose of stopping the train, is just simply a short lever and all you have to do is to move it into a notch. I can move the lever in a second but the brakes won't work that quick. It takes a little time after setting the lever in the notch for it to operate. You can't set them in any quarter of a second. I have been working with air brakes for nearly four years. It depends on what kind of a brake it is as to how long it takes for the brakes to set after you put the lever in the emergency notch. I would say that it would take that brake a second at least to take hold after putting the air brake lever in the emergency notch. It would take that much time on any engine at any rate of speed. If you were going pretty fast you would not know what effect it would have on an engine to throw the emergency brakes on with a full charge of air. You would all fall off. It would lock the wheels. On some engines it will lock the wheels. I have run engines that you could lock the wheels on it, especially if the rails were wet. This one was not that kind of an engine but you could lock the wheels on that engine. You can't lock the wheels on any engine with the emergency. It is not a fact every time the instant you put on the emergency, or the minute the brakes are set, that instantly the wheels stop turning. The wheels don't slide every time you put the brakes in emergency. Sometimes when you put the emergency brakes on it had the effect of locking the wheels. I could slide the wheels on that engine. I didn't try to reverse it but I did reverse the engine on that
162 occasion. The wheels didn't slide sixty-eight feet after I reversed it. I set the air and threw the reverse lever and put it in forward motion. That took a second and more than a second. I set the brake first and then put the engine in forward motion and then pulled the throttle wide open. I don't know whether the engine wheels made a revolution after that or not. I didn't look at the wheels. I don't know whether they rolled or slid all the way. If you lock the wheels they will go further than if you do not. It makes an impression or has an effect on the tires of the wheels if you slide them a foot. I didn't look at the wheels on this occasion. I know they slid some but I don't know how far. I put the air in emergency on this occasion. I put the air in emergency when I saw Rosenbloom go in front of the ballast car. The switchman gave me the stop signal. I put on the emergency when the switchman gave me the stop signal. Rosenbloom had just started across the track—he had started across the track when the switchman gave me the stop signal.

Over a month ago I was up in the office of the attorneys for the defendant and detailed to them what my evidence would be in this

case. I made a personal injury report to the Company the day Rosenbloom was killed. That is the only report I made. The Claim Agent was up there to see me, but I don't know how long after the accident it was. The fireman was present when I talked to the Claim Agent. He was up on the engine. The Claim Agent was up there talking to me but I don't know whether he talked to the fireman or not. The fireman was up on the engine while he talked to me. No, sir the Claim Agent didn't write out a statement
163 for me to sign. I never signed any such statement as you ask about, and I don't think the fireman did. I have seen the Claim Agent since then once in a while but he never has bothered me about this case. I never had any conversation with him but one time. He mentioned the case to me only one time. No other special agent has bothered me at all. They might have been up there but they never said anything to me about this case. About a month ago was the first time I went to the Attorney's office. The fireman went with me. The brakeman was not with me at that time. He might have been up there but he was not with us. We didn't talk the situation over there at that time with the attorneys. We went up there because we were asked to go up there. When we went up there that morning Mr. Trulove told us that they could not use us and wrote us out an order to the Superintendent that we had reported there and were released. I didn't then tell them about my evidence. That is the only time we went up there until today. I never did tell them anything until to-day about what my evidence would be. We were up there this morning and talked with them. The fireman, Mr. Fullington, and the brakeman and one more man and the Section Foreman were all up there. We were all up there in the same room a part of the time. I didn't detail my testimony there in the room with the others. I never said anything about it there in the room with the others. Mr. Madden called me off in a room to myself and asked me about the case and we talked about five minutes and he said I could go to dinner. I didn't hear any other of the statements with reference to the matter. I didn't read any statements they made there at the time. The statements were there but I never asked for them and they didn't show them
164 to me. They didn't show me any statement I had made. I didn't want to see it as I knew what was in it.

No, sir, it is not true that just after we ran over Mr. Rosenbloom that I said to the fireman "We have run over and killed that damned Jew." No such expression was used around there. I never did make such a statement as that at all at any place.

B. B. BOLLINGER testified for the defendant as follows:

I live at 709 East Thirteenth Street in Amarillo, Texas. At the time Rosenbloom was killed I was boarding at 1102. I was then a locomotive fireman working with Engineer Walker, the gentleman who has just left the stand.

I was on an engine pushing a ballast car at the time Rosenbloom was killed. I was on the left side of the engine on the fireman's box. The bell was ringing at the time and had been ringing since

we started in on track five. The engine was backing North. I was on the east side of the engine. I didn't see Mr. Rosenbloom at all prior to the accident. I didn't see him at all until after the accident.

On cross-examination he testified as follows:

The engine and ballast car were four or five car lengths from the lead when I commenced ringing the bell. I must have been five or six car lengths south of the Early Grain Elevator. That is where I began ringing the bell. I quit ringing the bell when we stopped.

I didn't see Rosenbloom at all until after he had been hit
165 by the ballast car.

Certainly I started ringing the bell on the engine seven or eight car lengths from Rosenbloom. We were further away from the Elevator than seven or eight car lengths when we started to back in on track five. We went in on track five off the lead, which is about fifteen car lengths south of the Early Grain Elevator, and I began ringing the bell seven or eight car lengths south of the elevator. We had run some seven or eight car lengths on track five before I began ringing the bell. There was a train pulling out on track four and I hardly do go down there—go down through the yards without ringing the bell. I was not afraid of running over the freight train on track number four but thought there might be someone in the yards who would get hurt. There were people in the yards. I began ringing at one place as much as another.

At the time we ran over Rosenbloom, I think I asked the engineer, when the engine stopped, what was the matter and I think he said we have run over and killed that Jew. No, sir, he didn't say "we have killed that damned Jew." He simply said "we have killed that Jew." That is all he said. If he said anything more I didn't hear it.

On redirect examination he testified as follows:

The engineer said "we have killed that Jew" but no one said we have killed that "damned Jew." That was just when we stopped at the time Rosenbloom was killed.

D. O. O'DONNELL testified for the defendant as follows:

166 I live at 1505 Sixth street in Amarillo. I am a railroad track man. I am familiar with the yards in Amarillo and know where M. A. Rosenbloom was killed. I knew the yards and was acquainted with them at the time he was killed down there. The blue print map you have presented to me is a correct diagram of the yards in that neighborhood as they were then and as they are now, other than there is another yard still north, or east as we say, not shown by this map. The yard shown by this map is what we call the middle yard.

I have measured the distance between tracks four and five at the point where Rosenbloom is said to have been killed. It is eight feet between the East rail of track number four and the west rail of track number five. There would be a space of from four feet and six inches to five feet between the cars of two trains standing or

passing, one on track four and the other on track five, at the place where Rosenbloom was killed. There would be that much space between the cars there. There would be plenty of room there, sufficient for a man to walk in, with a train on both tracks passing each side. The tracks are the same distance apart all the way along, all through the yards. It is the standard width of tracks over the System. It is thirteen feet from center to center, or eight feet from rail to rail. I don't know what is the customary or standard width of tracks over the county, but this is the standard width over the Santa Fe System. Some companies use nine feet from rail to rail, with fifteen feet from center to center and others use less.

I have been on the yards frequently where work was being done.

167 Have worked there on several occasions and walked through between the tracks going to and from my work, and have walked between the tracks with a train on each side of me—have walked through there with a moving train on each side of me and there was plenty of room there for me. I kept on walking without being injured.

On cross-examination he testified as follows:

I am yard track foreman. No, sir, I did not make the blue print sketch referred to. I first saw it to-day. There has been no change in that yard from the time that Rosenbloom was killed up to the present time, that I know of. I don't know who owns that yard and track. This blue print map is a correct map of that part of the yards where the injury occurred. The map shows the yard and tracks to be the yard and tracks of the Pecos and Northern Texas Railway Company and I suppose it is theirs.

I have been working for the Pecos and Northern Texas Railway Company for a year and a half. I was employed by J. H. Stinson, the yard master.

JOHN LAUGHLIN testified for the defendant as follows:

I am car inspector for the defendant company, and I suppose for the Southern Kansas Railway Company of Texas and the Eastern Railway Company of New Mexico. They change the names so much that I don't know who all is interested in the yards, but they call it all the Santa Fe System.

168 I remember the circumstances of a man being killed down there. Parties told me that his name was Rosenbloom. I was inspecting cars at that time. I inspected the ballast car that ran over him before the accident and after the accident. No, I am mistaken, it was inspected by one of my assistants before the accident, and I inspected it after the accident. I know of my knowledge the condition of the car before and after the accident. I saw it personally pretty soon after the accident. That car arrived about 10 A. M. and the accident occurred about 5:30 P. M. of that date, and I made an inspection of the car myself right after the accident. It was not over five minutes after the accident that I made the inspection of it. I found the car in first class condition. There was a bad order card on it but there was no defect in the car. I saw

the bad order card on the car at the time. The card indicated to test the air on the car. The car went to the repair track.

On cross-examination he testified as follows:

I don't know anything about the name of the Company. Sometimes we get checks on the Eastern Railway Company of New Mexico and sometimes on the Pecos and Northern Texas Railway Company. We all understand that we are working for the Santa Fe System. It has been changed from the Pecos Valley and Northeastern to the Eastern Railway of New Mexico. I can't tell you anything about when it was made. I am working for what we call the Santa Fe Road, whatever it is. I don't know whether it is the Pecos & Northern Texas Railway Company, the Eastern Railway Company of New Mexico, or what it is. All I can say is that I
169 am working for the roads known as the Santa Fe System. I don't keep up with that part of the work.

My foreman's name was Bronson. He is a car foreman. That is, he is foreman of the car department for the Santa Fe Company here in Amarillo.

I am not positive how the checks come. It may be the Eastern Railway Company of New Mexico, or it may be the Pecos & Northern Texas.

T. L. Bryant testified for the defendant as follows:

I am brakeman for the Santa Fe Lines.

I remember the occasion of Mr. Rosenbloom getting killed in the yards here at Amarillo near the Early Grain Elevator. I tested the air on the ballast car that ran over Rosenbloom. I tested it on December the third, 1909. It was on the third between eight and nine o'clock that I made the inspection. At that time I didn't know what they wanted the inspection for. I took a helper and tested this car on the third of December. It is car Number 89683 AT&SF, ballast car, empty and was setting on the rip track. They gave me a letter of instructions to inspect the air brake on this car. She has a K 2 Triple valve Westinghouse ten inch brake cylinder, and the last date it was tested was November the sixteenth, before that—was November the sixteenth, 1909. I think it was going out to Vaughn and it was sent to the rip track. It had no air brake defect. You usually find one when it is set out for air brake inspection.
170 The piston traveled five and a half inches and we tested this car with eighty pound train line pressure. The brakes would start to set with a three and a half reduction of train line pressure and the brakes were found in O K condition. It was in first class condition at that time, except that it was cut out of the train and not in train line.

Next was offered the deposition of A. P. Dodridge, as follows:

A. P. DODRIDGE testified by deposition, taken before Sam R. Merrill, Notary Public in and for Potter county, Texas, on the 18th day of August, 1910, being returned into court on the same, in behalf of the defendant, as follows:

My name is A. P. Dodridge; am 34 years old and my occupation is that of conductor and I reside in Amarillo, Texas.

At the time of the accident wherein M. A. Rosenbloom was run over and killed in the yards of the defendant Company at Amarillo, Texas, on November 27th, 1909, I do not know where I was, as I did not know when the accident happened. I was the conductor on the outgoing freight train. I heard of the accident and death of M. A. Rosenbloom but I did not hear of it until we had left town. I got my first information with reference to the accident from Dave Thomason. He was the trakeman on the outgoing freight train of which I was conductor. I was the conductor on a train which
171 left the yards at Amarillo on November 27th, 1909, at 5:55 P. M. I do not know what time the train left Tenth street. We were on train Number Thirty which was a red ball freight and stock train. I ran this train from Amarillo, Potter county, Texas, to Waynoka, in Woods county, Oklahoma.

I did not see the accident which resulted in the death of M. A. Rosenbloom, nor did I see him before or after the accident.

The number of my train was Thirty and I attach hereto the list of cars as shown by Form No. 1318, which is marked as Exhibit "A".

(Exhibit "A" attached to the answers of this witness, and referred to above, shows that he had thirty-six cars, and a caboose, all of which were traveling interstate except one, which was a car of well tools set out at Panhandle City, Texas. The entire train, consisting of cattle, stock, fruit, ore, etc., was being transported from various points in California, Arizona and New Mexico, to various points in Missouri, Illinois and Oklahoma. The Car Numbers, Initials, contents, etc. are as follows:

AT 350 Way car; RD 1677, Ref. Raisins Lawrence; CIS 17791, Box, Lumber, Kansas City; PFE 6957, Ref, Grapes, Kansas City; AT 34253, B, Raisins, Joliet; AT 8051, TN, Raisings, Chicago; CRL 4087, R, Rocks, Kansas City; AT 23876, B, Beans, Joliet; PRR 516506, B Fruit; Chicago, Illinois; MC 45781, B Goods, Kansas City; A.T. 26232 B, Goods, Kansas City; PRR 99994 B, Brass, Kansas City; SSMS 27177, B, Fruit, Purcell, Oklahoma; RD 1862 R, Raisins, Joliet; AT 33230, B, Bullion, Chicago; AT 41159 FN, Lumber, Kansas City; 41303, B, Lumber, Kansas City;
172 CM&STP 75990 B, Lumber, Kansas City; CB&Q 43478, B, Raisins, Chicago; PRR 823071, C, Co. Scrap Rails, Corwith, Illinois; IC 29897, B, Walnuts, Chicago; AT 42992, Fn, Ore, Argentine; AT 32987, B, Ore, Argentine, Ks; B&SRy 6104, B, Ore, Bartelsville; AT 76586 C, Well Tools, Panhandle; AT 69669 S, Cattle; AT 69066, S, Cattle Kansas City; AT 69848, S, Cattle, Kansas City; AT 69943, S, Cattle, Kansas City; AT 69729, S, Cattle,

Kansas City; AT 69318, S. Cattle, Kansas City; AT 68944, S. Cattle, Kansas City; AT 69583, S. Sheep, Kansas City; AT 69403, S. Sheep, Kansas City; AT 53800, S. Cattle, Kansas City; AT 57877, S. Cattle, Kansas City; and AT 51335, S. Cattle, Kansas City.)

We set out of this train a car of company Well Tools at Panhandle City, Texas. This was the only freight set out, but we did not unload anything, and we did not pick up any car or cars en route, nor did we load any freight from any station.

On cross-examination, he testified by deposition as follows:

I ran a freight train out of Amarillo on the evening that M. A. Rosenbloom was killed. There were thirty five cars and a caboose. I was the conductor in charge of the train. I do not know what I was doing at the very time Rosenbloom was run over, as I did not know about his being run over until afterwards. I did not see Rosenbloom at the time he was run over. I do not know where I was at the time he was killed, whether on top of the freight train or where. When the train pulled out from the yard office I got on the engine but I did not know of Rosenbloom being killed, and do not know where I was or what I was doing at the time.

173 I have not made a written statement to the Railway Company at any time of what I knew about this case.

C. E. FULLINGTON testified for the defendant as follows:

I am a switchman.

I remember the occasion of M. A. Rosenbloom being run over and killed in the yards here at Amarillo. That was on the twenty-seventh day of last November, as I now remember it. I was following the engine at the time to couple on to some Company coal and take it to the chutes. J. L. Walker was the engineer running the engine. There was one ballast car attached to the engine. The engine and the ballast car were backing up at the time, going North, as I suppose it is here. They were going towards the Denver tracks. I was at the time riding on the foot board next to the tank, on the engineer's side of the tank. That was the west side as we were going North.

I saw Rosenbloom prior to the accident. I saw him as the train moved down there towards where he was. We were going down on track number five. Track number four is the next west of track number five. Train number thirty was pulling out on track number four going east, or north it was. Rosenbloom was walking down between tracks numbers four and five by the side of train number thirty. He was right next to track number five and between tracks four and five.

174 Yes, sir, I hallooed at him. He was the length of a car and a half ahead of the engine and the ballast car when I hallooed at him. I hallooed at him at the time and he looked back and he seemed to get closer to train number thirty and he seemed to get so close that the train number thirty touched his elbow, and he looked back again and then started and ran across the

track ahead of the ballast car. That is the last I remember of him. He was about thirty feet ahead of the ballast car at the time he started to run across the track ahead of it. He was about twenty or thirty feet ahead of the ballast car and the ballast car is forty feet long.

I know the engineer who was then operating the engine. His name is J. L. Walker. When I hallooed at Rosenbloom he applied the air and put her over and reversed her—the engine, that is he put her in—where she would steam against herself. Yes, sir, the whistle was sounded. The engineer gave the road crossing whistle, two long and two short blasts. That was about five car lengths before I hallooed at Rosenbloom that the engineer sounded the whistle.

I cannot swear now as to whether the bell was ringing or not. I have no recollection of that at this time, but I don't think it was sounding.

On cross-examination he testified as follows:

The engineer didn't tell me anything. I was not in the cab. I was on the foot board and could hear the engineer reversing the engine, applying the air, and things of that kind. The tender was between me and the engine but I had my head stuck out from between the tender and the ballast car. The tender is about
175 fifteen feet long. I was standing on the end of the foot board on the engineer's side, right between the tender and the ballast car and had my head out—I had, you might say, my whole body out. I was looking in front. I could not, while looking in front, see what the engineer was doing but I could hear, and I heard it. He threw the engine in emergency and reversed her and pulled the throttle giving her steam for forward motion. That is the way it sounded to me. I know what I can hear. It is not a fact that all I know is what the engineer told me. I know he applied the air, and I know what else he did.

I now say that when—that Rosenbloom was about a car and a half ahead of the engine when I hallooed at him. That is what I told you, and that is what I say now. No, sir, the man on the ballast car was not almost to Rosenbloom at the time I hallooed at him. The ballast car is about forty feet long. I was not on the front end of the ballast car. That is not where I was. Yes, sir, I said that Rosenbloom was the length of a car and a half from the car when I hallooed at him. The ballast car is about forty feet long and the tender is about fifteen feet long. The tender and the ballast car made nearly a car and a half in length, or about sixty feet in length, but they didn't make that length from where I was. No, sir, you are off on the proposition that it was about 150 feet from where I was to the end of the ballast car. When I said that Rosenbloom was a car and a half from the engine I was not figuring on the other part of the engine, but was figuring from the car and the engine. He was about two or more car lengths from the engine proper. Yes, sir, he was, you may say, about four car lengths from the engine.

When I first hallooed at him he was about three car lengths
176 from the front end of the ballast car—he was about 120 feet from the front end of the ballast car—about that far from

me. Figuring in the ballast car and the engine tender Rosenbloom was something like four car lengths from the engine proper at the time I first hallooed at him. He was probably 160 feet from me.

The train moving out on track number four was picking up speed. It is according to what kind of an engine you have and the circumstances as to how much noise a long train leaving the yard will make. This train I think had a compound engine. A compound engine with a long train increasing speed make—may make noise. I did not pay any particular attention as to what it was doing in this particular instance.

When I hallooed at Rosenbloom I says "look out little Jew you will get your tail cut off." I did that and that is all I did at that time to keep from running over him.

Yes, sir, I saw him when he started across the track in front of the engine and ballast car. He was about sixty feet from me when he started across, and counting the ballast car he had about twenty feet—counting the ballast car out of that sixty feet he had about twenty feet when he started across the track—that is he was about twenty feet in front of the front end of the ballast car. He started diagonally across the track that the ballast car and engine were backing north on, and Rosenbloom started diagonally across the track in a northerly direction. He was not going in the same direction of the car, but diagonally across in front of it. I saw him just as he started across. The ballast car lacked about twenty feet of being to where he was when he started across. Jap Haney at that time signalled the engineer. I got across on the other side—
177 on the east side. I don't know myself why I did that, or how I did it. The first thing I knew I was over there. I got away from there because I thought he was hit. When he was hit I simply threw down my arms and got away. I knew he was hit when he started across. I didn't halloo at him after he started across because I didn't have time.

I don't know how long it takes a car to move twenty feet. It was a mystery to me at that time. The ballast car and engine was going four or five miles an hour I suppose—it was faster than four or five miles an hour. That would be only about as fast as a man could walk. It was going faster than that. Certainly a man can walk more than four miles an hour, but a man started to run across can run faster than that. The ballast car was running four or five or six miles an hour—about the same rate as a man could walk, I suppose.

I saw Rosenbloom when he started obliquely across the track, but didn't halloo at him because I was not on the head end of the car. I did not know where he was after he started. I saw him when he started but there was a man ahead of me switching there and watching out. I depended on Mr. Haney who was closer than I was, and after the man went out of sight I had no more view of him.

I don't know myself when it was I began to climb over on the other side. I don't know how I got over to the other side. You would have to ask someone else about that.

The engineer whistled two long and two short blasts which is a

public road crossing signal. It was a signal that would attract everybody's attention any place. The engineer was at the time he was sounding the whistle about four-cars—about four car
178 lengths from Mr. Rosenbloom. I hallooed at Rosenbloom just after the whistle was sounded. I don't remember now of but one time that the whistle sounded. I know I heard him sound the whistle for a road crossing. I would not swear that the bell was ringing though. I would not swear I heard it. I have no recollection as to the bell ringing and would not swear about that at all.

I saw Rosenbloom after he was run over. He was dead. His head was cut off. When I got to him after he was dead his body was lying outside—on the outside of the west rail of track five. I don't know how his body got outside of the rail. How do I know whether his body was moving around like a chicken with its head cut off. I was standing like a rum dum looking at him—they had to grab hold of me to make me realize what had happened. I forget now who it was who grabbed hold of me. His body was still when I first saw it after he was run over. We picked his body up and carried it to the yard office and called for the ambulance. The yard master and the switchman carried his body down there. His head was cut off. I can't swear as to whether it was entirely severed. I think there was just a little skin or something holding it.

I didn't hear the engineer say "we have killed that damned little Jew."

Redirect examination, he testified:

No one made any such statement as counsel for plaintiff- attributed to the engineer.

I hallooed at Rosenbloom once. When I first discovered Rosenbloom he was walking along between tracks numbers four
179 and five and then moved over a little towards track number five. I hallooed at him and when I hallooed at him he moved off closer to track number four. He got so close to it, it appeared to me, as that his elbow almost touched the cars in train number thirty moving out on track four. He then again looked back and started diagonally across track number five in front of the ballast car.

When we found Rosenbloom after his death he was lying a little bit north of where he first approached the track when he started diagonally across track five. His body was on the west side of the west rail of track number five and his head was on the East side of the west rail of track number five. His feet and legs and body were extending almost straight out from track five.

A. D. THOMAS testified for the defendant as follows:

I am a brakeman and run in and out of Amarillo, both ways. At the time Rosenbloom was killed, on the twenty-seventh day of November, 1909, I was brakeman. I remember the occurrence. I was rear brakeman on train number thirty at that time. A. P. Dodridge was conductor. I was not on the ballast car and not a member of the switch crew handling the engine and ballast car.

I saw the accident resulting in the death of Rosenbloom in the yards there. I was about one hundred and fifty feet from
180 Rosenbloom at that time. I was on the ground between tracks four and five and train number thirty was pulling along beside me. Train number thirty was on track number four pulling out. When I first saw Rosenbloom he was on the rear end of our train riding down track number four. I was then at the head end of the train going East. We pulled out slow and he stepped off. I could not say how long it was after he stepped off our train until he was run over by the ballast car. I could not approximate how far it was. When he stepped off our train—that is train thirty that went out on four, he walked along between the tracks and was at about the end of the ties on track number five, and he walked along there until they attracted his attention with the whistle on the train that ran over him. I heard some one halloo at him. I could not say who it was but I heard it—I heard someone halloo. I was East of him—some call it east. I was along ahead of him the way the trains were going. I was going out on Train thirty. I heard the whistles sounded. The engineer blew the whistle. I didn't understand what *what* was said when the person hallooed at him, Rosenbloom, but I heard someone halloo watch out. Right after I heard the switchman Halloo I saw Rosenbloom make a couple of quick steps towards track number five, and the car struck him before he got across. I don't know how many steps he made but about two or three after starting across before he was struck. He moved quickly. He walked—he was walking along near the ties between tracks numbers four and five and he stepped right in front of the ballast car on number five. I could not state how far he was ahead of the ballast car when he stepped on the track, but I should say he was in thirty feet
181 of it. I think Rosenbloom was nearer track number five when the engineer sounded the whistle than he was to track number four.

In Railroad parlance I was East of Rosenbloom and Rosenbloom was east of the switch engine when I heard the whistle sounded and heard someone halloo at him, but the direction is really nearly north. When the engineer blew his whistle Rosenbloom turned his head and started across the track. He had been walking along there slow with his head down with a paper in his hand—with a paper or something in his hand. They struck him before he got over. The ballast car struck him.

When they struck him he fell on his face on the west rail and turned over twice; he almost rolled out. At the time the wheel caught him his body was between the tracks four and five, and his head was on the west rail of track number five.

On cross-examination he testified as follows:

I was about one hundred and fifty feet from Rosenbloom when he started across the track in front of the ballast car. I was waiting for the caboose of my train to come along. I was standing between tracks four and five. Rosenbloom did not ride far on the train that was going out on Track number four. He just rode a short

distance, some six or seven car lengths from where he was run over. He then walked down by the side of the moving train. I was standing between tracks four and five. I had not been standing all the time, but had been walking towards him all the time slowly—very slow. I was down further north at the time Rosenbloom was riding on the train—at the time he rode a short distance
182 hanging on to the train on track number four. I might have been eight car lengths from Rosenbloom at the time he stepped off the train. I saw him get off the train. I think he was riding on a coal car—I know he was not riding on the caboose of the train. He was on the side step of the car, or the stirrup. After he got off the train on track number four—train thirty it was—he walked on down North and finally got over on to the end of the ties on the west side of track number five. Then he walked along on the ties slowly, and after that he started across the track number five in front of the approaching ballast car. I saw him start across track number five. I saw the ballast car coming. No, I didn't know he was then in danger, because I expected him to step out of the way.

I didn't halloo at him because he was too far away and they were blowing the whistle at him. No, I didn't halloo at him, and I don't know why I didn't do it. I could not make any effort to save the man where I was at the time. I was too far away from him, and those in charge of the ballast car and engine were making all the efforts they could for him. I don't think I could make him hear me from where I was at the time, under the circumstances.

The brakemen on the ballast car were a little further away from me than Rosenbloom was. One of them was on the front end of the ballast car and the other was on the rear end of it, and I heard them halloo at Rosenbloom at the time. I don't know whether I could halloo as loud as they did at the time or not. I could not say which one it was I heard halloo, but they hallooed at him to
183 look out. I heard them halloo "look out." They hallooed more than once, but I could not say how many times they hallooed. I suppose I can halloo as loud as they did.

I thought that Rosenbloom could get across in front of the car from where I was. He might have been thirty feet or he might have been more than that from the ballast car. I can't tell you exactly how far he was, but my opinion is that he was fully thirty feet and possibly more.

Yes, sir, I said that when the car hit him he fell on his face and that he rolled over to the west side of track number five. It looked to me like he rolled over twice. When the car struck him he turned over and almost rolled out. I never said that the drawhead struck him in the back. In rolling over he got his body over the rail over the rail on the west side of track number five and the wheel cut his head off.

There was quite a crowd there and I just caught on to my freight train that was pulling out on track number four and paid no attention further to him. I knew I could do no good by missing the train and staying there. I think I made a statement about the

matter the next day. It was not for me to make the report, however. The accident was not on my train. I did not get back off that trip until the next day. It was two or three days, perhaps, before I signed a statement of the accident.

It is quite true that I did not report the killing until I got back to Amarillo. I can't remember the date when I made the report.

I saw the report this morning. I talked with the lawyers
184 for the defendant in this case this morning about this case. but there was no other witness present at the time I talked with them.

On redirect examination, he testified:

This is the written report that I have been testifying about—this report you hand me. Yes, sir. I considered that with the attorneys for the defendant this morning, when I asked the attorneys about it and told them that I wanted to see it. This is my signature to the report or statement. They showed me this statement this morning.

I was not connected with the switch crew that was handling the engine and ballast car at the time of this accident. I was on train number thirty that went out over the Southern Kansas Railroad to Wynoka that night. I was one of the brakemen on that train. I saw the whole switch crew there with the engine and ballast car. They were all there when I caught the caboose on my train and went on out.

It was not my business to make a report of an accident that happened on another train. It is not even my duty to make reports of accidents that happen on the train I am. I don't make the reports when accidents happen. It is not the duty of a brakeman to do that, but it is the duty of the conductors to make such reports when anything happens in connection with trains.

There was plenty of room at the time for Rosenbloom to have remained between the tracks that I was between and to have protected himself. I didn't do anything, as I didn't think there
185 was any necessity for doing anything. I thought he would take care of himself. I thought he would step out of the way. It never occurred to me to warn any man by halloo- at him when the whistle was sounded, and nothing of the kind occurred to me at this time. There was plenty of room there in the space between the ballast car and engine on one track and the outgoing freight train on the other for the deceased to step off and walk along between tracks four and five.

On recross-examination he testified:

It was the engineer's duty to control the movements of the engine. It was Mr. Walker's business to control the movements of the switch engine in this instance. It was the duty of the switchman if they saw him in danger to give the emergency signal and it was the duty of the engineer to act on that signal and to stop as quickly as he could. If the front brakeman—there on the front end of that ballast car—if he saw a man being run over it was his duty to give

the engineer the emergency signal, and if the one on the rear saw it it was his duty to give the signal.

I did not get run over by the ballast car. It didn't run up behind me without my knowledge. It came facing me and I saw it all the time.

It is not true that when two trains are running abreast on these two tracks that the space between them is very narrow. I can't say just the exact distance it was between them, and I don't know the exact distance between the west rail of track number four—rather the east rail of track number four and the west rail of track
186 number five. Nor, do I know how far from the rail this ballast car would extend over. I don't know that I have ever walked between two trains where both were running, on these two tracks. There is room there for one to be walking under such circumstances, though. I don't know that I would want to be walking there if they were coming without my knowledge at all.

I saw Rosenbloom walking right along on the side of track number five on the end of the ties. I think it is true that the ballast car extends over the rails beyond the ends of the ties a little bit. I didn't know that the ballast car would hit him. I supposed the ballast car would hit him if he continued on the end of the ties and it continued to run on him. I didn't know that it would hit him before he started across the track in front of the ballast car, and when he started across the track I supposed he would get across, and of course, if he didn't get across I supposed they would stop and not run over him. Yes, sir, the engineer did something at the time to stop the engine and prevent the injury. He did his best to stop it it looked to me. He applied the air, and the reason he didn't stop without hitting him was that the distance was too short. I know he did his best to stop the train because I heard the air and heard the air reverse. I heard him throw the engine into forward motion. The engineer, I guess was about two hundred feet from me at that time. I could hear the air exhaust. From what I heard and saw and simply having heard it, I am willing to testify that the engineer did every-ing in his power to stop the engine and prevent this accident.

187 J. A. ROACH testified for the defendant as follows:

I am a civil engineer. I know where M. A. Rosenbloom is said to have been killed. I was acquainted with the switch yards at that time. Am very familiar with them. I made the map you present to me. The general directions of the sidings as shown by this map are north and south. The sidings are east of the main line.

(Witness here identifies and verifies as correct the blue print map introduced in evidence and attached to the original statement of facts.)

This map shows the north freight yards. The upper part of the map is made to a scale of 100 feet to the inch. There are two representations of this yards to this map. The upper one is on a scale of 100 feet to the inch. The lines on this upper showing are

the center lines of each track. This other showing of the yard is made on a scale of 20 feet to the inch, and the solid lines on there shows the rails of each track, and the broken lines represent the center of each track. This map is on a scale of twenty feet to one inch. I have measured the distance between those lines—between the rails of tracks four and number five at the point where Rosenbloom was killed. The distance between the west rail of track number five and the east rail of track number four at the point where Rosenbloom was killed is 8.33 feet.

On cross-examination he testifies:

188 I made the map on February the eighteenth, 1910. That was since Rosenbloom was killed, and I made it at the request of the attorneys for the defendant to be used in the trial of this case. I don't know whether the suit had been filed at that time or not. I- took me two hours—about two hours to make the map. I went on the ground and made the measurements of all these distances. I made every one of them with J. C. Hooper. I got the data from which to make this map by actual measurements on the ground and then went to my office and drew the map. I don't know whether this was before the suit was filed or not. I think the Claim Agent instructed me to make this—to do this work.

Tracks numbers four and five are in exactly the same condition now that they were on the date of the accident. Sometimes I worked there in the yards and sometimes I did not, but I know they are in the same condition now as they were then because I have been there both before and after the accident and know that the tracks have not been changed. I am not there except when my work calls me there. I suppose all tracks are subject to maintenance work all the time to keep them in service.

A box car will average a little over—well from eight and a half to nine feet in total width. Between the rails the distance is 4.71 feet. The average box car is between eight and a half and nine feet in width, but the widest car, I would say, would be a little over that, 8.71 feet, I would say, would be an average. The average box car then, would extend over the rails two feet on each side, or in the neighborhood of that. The ties would extend some-
189 thing like two feet beyond the rails—not quite two feet. The car would extend over the rails as much or a little more than the ties. It always extends as much as the ties. A car would extend over the rails three or four feet—I mean inches more than a tie would.

The distance between the west rail of track number five and the East rail of track number four is 8.33 feet. A Ballast car is practically the same width as a box car. I don't know whether there were any low joints along there or not.

On redirect examination he testifies:

The blue print map referred to is absolutely a correct representation of the distances and directions represented on it—rather indicated on it.

(The map is here offered in evidence, and is attached to the original statement of facts.)

J. N. HANEY, JR., called for further examination by counsel for defendant:

I am acquainted with Mr. Fullington. He was a member of the switch crew handling the engine and ballast car, about which I testified when previously on the witness stand.

Yes, sir, I have had a conversation with Mr. Fullington after I left the service or employment of the Railroad Company
190 about this case and about the facts of this case. I have seen Mr. Fullington on the streets several times and I have seen him up in Judge Stanford's office one afternoon, that I recall. He and I talked about the facts and circumstances surrounding the killing of Rosenbloom in the yards and around our work. I can't recall the date or the time or the place that I first talked to him about the matter after I left the service of the Company, down here in town. I have seen him on the streets. I remember before the primaries—before the primary election—it was on the twenty-third of July, was it not? At that time I was connected with the Amarillo collection Bureau and had some business with him. I remember talking about that. But, as to the facts of this case I don't know whether I talked to him or not. On the day that he was taken out of the service for this trial I think I met him on the streets near the Amarillo National Bank, between third and fifth streets and had a conversation with him in which I discussed with him the matter of his testimony, and the giving of his testimony in this case, and the facts surrounding this case. That must have been when this case was set for trial before. I don't recall any such thing as having, in that conversation, talked to him about his testimony and suggested to him that he swear that no signals were given to Rosenbloom at the time of the accident. It is a fact that I never at any time, nor at any place on any date suggest- to him to perjure himself nor to tell anything more than the straight facts. No, sir, it is not a fact that in that conversation, that the substance of it was that he should testify that he and the other members of that switch crew did not give any whistle or
191 bell warning to or halloo at Rosenbloom prior to the time that Rosenbloom was run over there, in connection with the accident. I did not suggest that to him. He may have said that he would tell the truth about the matter, but I positively did not suggest to him that he swear that no signals were given. No, sir, I did not, when he refused to make a statement, tell him that he was a fool, and that if he would come across that he would get fixed up for the winter. I never had such a conversation with him at any time or place.

After the time that I had had this conversation with Fullington I went with Judge Stanford to Fullington's house and saw him. We did not carry along with us a written statement and ask Fullington to sign it without reading it. I saw him, but I don't know of any statement prepared by Stanford for him to sign, and

I furthermore say that Mr. Fullington said that he didn't care to make any statement in writing. He said he didn't want to do that because he had previously made a report to the Company. I believe that was about the effect of the conversation. Judge Stanford, Mr. Fullington and myself were there at the time. I don't believe I ever went with Judge Stanford to see any other witnesses. I don't know whether Judge Stanford ever went to see any other one of the defendant's witnesses or not. I can't answer why I went with Judge Stanford to see this particular witness, any more than Judge Stanford asked me to go—asked me where he lived and where his—and what his hours were and wanted to go out and talk with him, and we went to see him just a few evenings ago. I don't remember the date.

192 Mr. Stanford requested me that if at any time I saw Mr. Fullington he would like to see him at his office, and we went up there together. I don't remember when that was, but think it was not to exceed thirty days ago. I don't know what Judge Stanford's object was in getting Fullington up there. Stanford remarked to me that he wanted to see him and wanted to talk with him. I heard the conversation between them, but I never heard a statement to the effect that if Fullington would come through and give testimony that he would be fixed up for the winter. Nothing that sounded anything like that occurred before me at all.

"I want to state to-day, as I did yesterday, that my statement was prepared by another man and I was requested to sign it and I did not attach much significance to it because I was in the employ of the Railroad Company at that time."

I would not like to state under oath that they requested me to make this statement or to make a statement that was false but at this time I signed this statement that this gentleman prepared at my home. No, sir, I do not mean to tell this jury that. If they had asked me to sign a false statement I would not have signed it. Miller did not ask me to sign a false statement and if he had I would not have done so. He only asked me for the facts and I related them to him and he reduced them to writing and then I signed the statement.

Further interrogated by counsel for plaintiff, he testified:

193 Yes, sir, it is true that I introduced Fullington to you (Stanford) at the time he came up to your office. I introduced him to Judge Stanford then. Yes, sir, it is a fact that you (Stanford) asked him just to state the facts. I never heard you suggest to him or any other way that I know of, that you wanted him to tell you anything else but the facts.

Yes, sir, it is a fact that on last Tuesday night you (Stanford) requested me to go with you up to Charles Fullington's house and talk with him again. Yes, sir, it is also a fact that the reason you (Stanford) wanted me to go to his house was because I knew where he lived and you did not, and when we got out there we all sat down in the moon shine on the front gallery and simply went over this case and talked about it and you (Stanford) asked Fulling-

ton whether or not he was willing to make a statement to you and have it reduced to writing, and then he replied that he had already made a statement to the Railroad Company and he would not make any further written statement. Yes, sir, it is a fact, and it is true, that you (Stanford) never suggested or intimated to him on that occasion that you wanted him to state anything else other than what the actual facts were surrounding this killing and accident.

CHARLES FULLINGTON recalled by the defendant, testified as follows:

I know J. N. Haney, commonly called Jap Haney. He was a member of the switch crew at the time of the accident in question. He has talked to me about this matter and this suit. He approached me sometime ago and talked to me about it. We had a conversation and he wanted me to go up to Mr. Stanford's office.
194 We went up there and Mr. Stanford wanted me to make out a statement. Then another time out at the house, a night or two ago, they came out there and they wanted me to sign a statement and I told him (Stanford) that I would not sign a statement for him or anybody else.

At the first conversation Haney said to me that we would get fixed. I don't know how that was. He just said we would get fixed. He didn't come out and say for what nor how. That was three or four weeks ago, or a month, I presume. It was over on Fifth street here in Amarillo. Mr. Haney began the conversation about this suit. I don't remember exactly what he said. We just got to talking about first one thing and then another and this case came up and he then said that Stanford wanted or would like to see us, and we had a conversation. That is all there is to it. We had a little conversation and he asked me a few questions and I answered them. He asked me how far the tracks were apart and where Rosenbloom was standing and where he was going, and where I was standing and where Haney was, and I answered those questions. We then walked on down the street and I never saw him any more. Yes, sir, he asked me if a slow signal was given, and I told him I thought there was. That is, I think he asked me that, and I was looking out for myself. Haney said he didn't give no slow signal.

It was down on the street where he said that I would get fixed for the winter. When he said that that was the last I saw of him. That is all the conversation I had there. I don't know what was said just before he said I would get fixed for the winter. I never paid much attention to it. I don't know what I said when Haney said that. I don't remember now what I said—it has been so
195 long ago. That was about twenty minutes before we went up in Stanford's office. We just had a conversation up there in regard to the injuries. The conversation in Stanford's office was just like I told you. It was in regard to how the tracks lay, which way we were going, where Haney was standing, where I was, where Rosenbloom was, whether the engineer pulled the whistle, whether

the bell was rung and whether the engineer applied the air. They simply asked me the questions about where Rosenbloom was and what he was doing down there, and I told them that I didn't know and that was the truth. I didn't know. I didn't know what he was doing where he was going or what he was going for. They asked me whether the whistle sounded and whether Haney gave any slow signal. I told them I thought he did, which I do think. Haney said he never gave any slow signal. I don't remember whether he wanted me to corroborate that statement of his or not.

I don't remember that Jap Haney told me on the street that I was foolish—that if I would come through, we would get fixed. He said that we would get fixed, but I didn't know how I would get fixed. Stanford never made that remark to me, and Haney never made such remark in the office.

On cross-examination he testified:

The first time I ever saw you (Stanford) to know you was when you came out to my house and introduced yourself. You wanted a statement from me, the same as you have several times since.

196 Yes, sir, you (Stanford) wanted me to make a statement. I told you I would not do that as I had made one out to the Company and if you wanted a statement you would have to look that up. You just asked for a statement and I told you I had made one out.

The next time you (Stanford) talked to me I talked with you in your office when I went up there with Mr. Haney. Yes, sir, we simply talked about the case then. The next and last time you talked to me was when we sat down on the edge of the gallery at my house. You then wanted me to sign a written statement. You said you had one—I understood from you that you had a statement that you wanted me to sign.

Yes, sir, I stated that Mr. Haney said I would get fixed. I didn't know how I would be fixed nor anything about it. I don't know whether he had already been fixed or not. I don't know about that. They all get fixed that get fired, but they don't get fired necessarily if they don't testify in favor of the Company. All I do is to tell what I know and what I saw, whether it hurts the Company or not—I can't help it. I would take the can and go on I guess.

When I saw Rosenbloom he was walking down between the track. I don't remember whether he had any paper in his hand or not. I don't know whether he seemed to be looking at those numbers on the sides of the cars or not. He was in the clear and out of all danger. I was looking ahead to see where the cars were. I never made any such statement to you that he was looking at those cars. I didn't tell you that.

197 J. S. BELL testified for the defendants as follows:

I am acquainted with the duties of an assistant car seal clerk, as they keep the seals and attend to their business, and as they work here in Amarillo. When trains come in from Clovis, over the Pecos and Northern Texas Railway Company's line, coming

east from New Mexico, and going out over the Southern Kansas lines east, such clerk is supposed to take the seal numbers on each side, up one side and back on the other, providing the train stands still long enough. He goes up one side of the train and down the other and he takes the number of the seal on the car door of each car and observes the position of the ventilators, and takes car numbers and initials of each car and writes it down in a book, and if there is anything wrong with the ventilators or anything to be done, he makes a note of that and reports. He also makes a note of whether or not the car is iced and reports that. He makes a report of all those things. After he has taken down all these matters in a book he takes the book back to the office and it is a part of the records at the yard office for reference in correspondence. The book is kept there as a record of a part of the business in handling trains and to answer correspondence from, and to give the condition of the car when it passed through Amarillo, and to know whether or not it was sealed and whether or not it came in unsealed and what seal it was under. Except as before stated to answer correspondence by, I don't think there is any report made out from this book. Correspondence coming from the Claim Department in regard
198 to the condition of the stuff, or any inquiries about it, would cause them to refer to this book to answer any such correspondence. The Claim Department may want to know the condition of a car, whether it came in under seal or not and then this book would be used to tell them with reference to that. In this book they make notations as to the condition of the car and of the ventilator and whether or not it had ice, and the condition of the freight inside. The contents would be checked if it was unsealed and they would note whether or not the car had been pilfered and a notation of the shortage, if any, would be made.

Mr. Rosenbloom, before he was killed, was seal clerk and it was his duty to perform this work—all this work that I have been talking about were—was in line of his duty.

AVERY-TURNER testified for the defendant as follows:

I have been engaged in the railroad business forty years. Am now located at Amarillo.

Yes, sir, I am familiar with the lines of railroad known—owned by the Eastern Railway Company of New Mexico, the Pecos and Northern Texas Railway Company, the Southern Kansas Railway Company of Texas and the Atchison, Topeka and Santa Fe Railway Company. The lines of the Eastern Railway Company of New Mexico is located in New Mexico. The physical properties of the line of the Eastern Railway Company of New Mexico connect with the physical properties of the line of the Pecos and Northern Texas Railway Company at Texico on the New Mexico-Texan line.

The Pecos and Northern Texas Railway Company's line extends from Texico to Amarillo. It also has a line from
199 Amarillo to Lubbock and Floydada. The physical properties of the line of the Southern Kansas Railway Company

of Texas connect with the physical properties of the line of the Pecos and Northern Texas Railway Company at Amarillo. They physical properties of the Southern Kansas Railway Company of Texas connects with the physical properties of the Pecos and Northern Texas Railway Company at Amarillo and extends in a northeasterly direction to a point on the Oklahoma-Texas State line, near Higgins, Texas—about a mile and a half East of Higgins, Texas, where it connects with the physical properties of the Atchison, Topeka and Santa Fe Railway Company. The line of the Southern Kansas Railway Company, of Texas, extends between Amarillo and the Oklahoma-Texas State line.

The Eastern Railway Company of New Mexico is organized and chartered under the laws of the Territory of New Mexico, and the Pecos and Northern Texas Railway Company and the Southern Kansas Railway Company of Texas are organized under the laws of the State of Texas, but the Atchison, Topeka and Santa Fe Railway Company is organized and chartered under the Kansas laws.

The lines of road owned by these various Companies form a through line interstate, and they did in November, 1909, and in November 1909 they were engaged in the transportation of freight and passengers interstate, and interstate commerce. They were transporting goods and passengers from state to state and between States and Territories.

In November, 1909, I was acquainted with the general run of freight being transported over these lines and the proportionate parts that were interstate and local. I know it by general observation and can approximate the proportionate part that was interstate and that that was local of freight that was then being transported by these Companies. On the twenty-seventh day of November, 1909, about eighty-five per cent of all the freight handled by these Companies was interstate. I will say that about eighty-five per cent of all their business was interstate.

200

I know where their freight generally originated and where it was generally destined to—I know that in a general way.

Red-Ball freight derives its name from a card that *it* tacked on the car when high classed freight is loaded that it is desired to expedite. For instance: If Chicago loads out a car of merchandise for Amarillo, and a red ball card is attached to it—a card about seven inches in diameter—about seven inches square, which is tacked on to the side of the car, along about the center of the car, and in the center of this car- is printed a red ball about five inches in diameter and that carried the name of the fast train or the number of the fast train in which it is run, and a record is kept on that freight, and the object of it is to enable the man who handles it—the men in charge of it to keep an eye, as it were, right on that car until it reaches its destination, and if, for any reason it is delayed he is advised of it, and great pains are taken to assure the delivery of that car of red ball freight. We advertise that as one of the advantages of using our road.

I was in charge of the Company's business at the time we put that practice in effect—at the time that practice was instituted. It was invented by Mr. Kouns.

201

Red ball freight coming from the west are cars of high classed freight, such as oranges, nuts and all deciduous fruits—raisins, etc., which may originate in Australia, San Francisco, New Mexico or Arizona. It goes to almost all points of the world. Generally to Kansas City, Chicago and Eastern points.

Cross-examination he testified as follows:

I don't know the place where Rosenbloom was run over and killed. I am acquainted with the yards. I designed the yards. The yards belong to the Pecos and Northern Texas Railway Company.

I have seen J. L. Walker and know him by sight.

Yes, sir, while crews are engaged in switching and handling freight that is going interstate, in the yards in Amarillo, they are engaged in interstate commerce. They are aiding in carrying goods out of the State. No, sir, a snipe who puts in a tie is not aiding in handling interstate commerce, or freight, for they do not handle the freight. He had nothing to do with interstate freight. You can carry interstate freight without a track—you can carry it by water but not out of the Panhandle.

On redirect examination he testifies as follows:

The distance between two trains, one on track number four and one on track number five, at the place where Rosenbloom was
202 killed, as shown by the map you exhibit to me, presuming that the cars are of average width, would be four feet and two inches.

Yes, sir, I have worked in the train service. I have worked as yardmaster, brakeman freight conductor, construction conductor, etc. for a period of six years.

I have passed down between tracks four and five at three o'clock in the morning—I think it was on August the 21st. I came in from Plainview and passed down between these particular tracks, numbers four and five shown by this map, and cars were moving on both tracks at the time I passed down them, and I never thought I was in any danger at all.

On recross-examination he testifies as follows:

No, sir, I didn't know those two trains were there before I got in between them. One was there but the switch engine overtook and passed me. I didn't know that it was coming when I passed down—when I started down between the tracks. It didn't get on me at all. It didn't come right up on me before I knew it was coming, because I never walk in the yards but that I know that anything is liable to come. I knew it was coming when I heard and saw it. I would not allow a train to run up on —. I would watch out and prevent it and get out of the way. That is the duty of every railroad employe.

On redirect examination he testifies as follows:

The most prominent rule of the Company is that in case of doubt to take the safe side and employes are instructed to do that.

I made the rules now in use at Amarillo. I state this in connection with my previous statement.

All employes are instructed to look out for their own safety first, but in cases of necessity, to save the lives of others, then a hazard is permitted. Employes are required to read the rules and are examined in regard to them.

On recross-examination he testifies as follows:

I cannot say whether Mr. Rosenbloom had a copy of those rules or not. I didn't know him. I only know that he knew something about the rules because he could not have performed his duties unless he knew them. He would not have been employed and he could not have worked for the Company unless he knew them. He could not have performed his work and duties if he had not have been informed as to the rules.

It is made the duty of all employes when they see men exposed to imminent danger, for them to use every means in their power to avoid running over them, if they know that the man would remain on the track and be run over if they did not. I stated in answer to defendant's counsel's question that if an employe should see a man in great danger, of being run over that it is his duty, even to violate the rules and do everything to avoid striking him. If a man is seen to fall on the track helpless so that he could not or they knew he would not get off—an employe has to know a man is in danger before he is required to exercise the means at his command to avoid doing him injury. If an employe sees a man helpless in any way it would be their duty and it is the requirement of
204 the Company, that they do everything in their power to avoid striking him. If an employe is handling an engine and sees another employe in the way and knowing he cannot get out of the way, or will not get out of the way; it is his duty to avoid injuring him, but he must know these facts before it becomes his duty to take steps to avoid an injury. Suppose an employe handling a switch engine, or any engine as for that matter, sees a man in front of the moving engine and he realize- that he is in great danger of being run over, it is their duty to do everything in their power to avoid running over him if they realize that he is in danger; but, if they see a man crossing the track they may presume that he will get out of the way. If they know he is in danger and will be hit, it is certainly their duty, when they do know that he is in danger, to do all in their power to avoid striking him and the Company requires this of them.

On redirect examination he testifies as follows:

If a switchman sees a man ahead of him and his position is between the tracks where he would not be struck if he kept in his position, there is no rules requiring him to stop his train in such a case. If they see such a man ahead of them on or near the track they may suppose that he will get out of the way until they see he is not going to. It is their duty to give signals and to stop when they know that he is in danger. You could not operate a road if

you stop for everything that crosses the track, because every minute in the day that is done.

Defendant rests.

205 *Plaintiff- in Rebuttal.*

J. N. FREEMEN testified for the plaintiff- as follows:

I am Secretary and Treasurer of the Pecos and Northern Texas Railway Company. The Pecos and Northern Texas Railway Company owns physical properties in this State. It owns the lines of road between Amarillo and Texico, and also a line from Amarillo as far south as Lubbock and Floydada now.

I know the location of the Pecos and Northern Texas Railway Company's yards in Amarillo. They own the yards south of Fifth street in Amarillo, Texas.

The employes of the Pecos and Northern Texas Railway Company are sometimes paid by checks drawn on the other Companies. In some departments they are. A conductor running over the several lines would be required in such an instance to make out three or four checks, but they are paid out of the Southern Kansas Railway Company of Texas funds and at the end of the month a charge is made against the other companies for their proportion of the services rendered under such check. Trainmen are not paid by Eastern Railway Company of New Mexico checks. All of them are paid by Southern Kansas Railway Company's checks.

On cross-examination he testifies as follows:

206 Switchmen on the joint roads of the Pecos and Northern Texas Railway Company and the Southern Kansas Railway Company of Texas receive Pecos and Northern Texas Railway Company pay checks, and that was the case in November, 1909. They have always been paid in Pecos and Northern Texas Railway Company's checks.

Plaintff- closes.

Defendant's Testimony.

J. P. MILLER testified for defendant as follows:

I know J. N. Haney, Jr. Have met him two or three times.

I am claim adjustor for the defendant Company. I was Claim Adjustor at Amarillo in December, 1909.

The witness is here shown the written statement signed by J. N. Haney, Jr., and about which J. N. Haney, Jr., testified, and which bears the signature of J. N. Haney, Jr., as stated by him, and testified with reference thereto as follows:

These three sheets handed me are in my hand writing and constitute the statement I took on December third, 1909, of J. N. Haney. It was signed by J. N. Haney, Jr. He signed it in my presence.

It is in my handwriting. I saw him sign it. I don't know whether you would call it dictating a statement or not, but I asked him questions and he made answers and I wrote them down—
207 wrote down a statement of what he said. I then had him to read it over—I read it over to him. I wrote down everything in there just as he told it to me. I don't know that I put in everything that he told me, but every thing that I did put in he did tell me. I might have left out some words or some things that he said. No, sir, there is not a thing in there that Mr. Haney did not state to me himself. I just talked to him about the accident and asked him about it and he stated to me all he knew about it. Then I asked questions to bring out points that he overlooked, and after he gave me everything he knew about it I wrote it down as near as I could, and had him read it over to see if there was anything in there that he did not want to sign, and he read it over and signed it up. Yes, sir, he did read it over before he signed it.

On cross-examination he testified as follows:

I took that statement on December the third, 1909, a short time after Rosenbloom was killed. No suit was filed then that I know of. I did not take the statement of the rest of the train crew that date. I took a good many close to that time—some of them right about that time and some afterwards. I don't know, and I would not say that I showed Mr. Haney any of those statements. I don't know that I had them with me and didn't show them to Haney. I would not say that I did or did not tell Mr. Haney what the other witnesses would testify to. I was taking statements and don't know who I struck first. I know that I took other statements but I would *say* say that I had taken Charles Fullington's statement and Mr. Walker's statement and the fireman's statement and had them with me and showed them to Haney at the time I took
208 this statement. I would not say that this is or is not a fact. No, sir, I would not say that I did or did not tell Haney anything about what they said.

I was not there to get a statement that would exonerate the Railway Company, but I was there to find out how this accident occurred. They take care of their side of the case.

I am Assistant Claim Adjuster. It is my duty to go on the ground right after an accident and take the statements of those who know anything about it. It is not my duty to get a statement that will exonerate the railroad company. It is my duty to get the facts. I have been in the Claim Department for three years and suppose I have taken three thousand statements a year, perhaps. I don't believe I ever took a statement that showed liability on the part of the railroad company. I don't remember ever taking one.

209 In District Court of Potter County, Texas, 47th Judicial District.

No. 1204.

Mrs. M A. Rosenbloom et al.
vs.
The Pecos and Northern Texas Railway Company.

We, the undersigned attorneys for Plaintiffs and Defendant, in the above entitled and numbered cause, hereby agree that the above and foregoing is a true and correct statement of all the facts proved and testimony introduced upon the trial of the above cause, and that the same may be filed as the authentic statement of facts in this cause.

COOPER & STANFORD,
Attorneys for Plaintiffs, Mrs. M. A. Rosenbloom et al.
MADDEN, TRULOVE & KIMBROUGH &
F. M. RYBURN,
Attorneys for Defendant, The Pecos & Northern Texas Railway Company.

I, L. C. Barrett, Special Judge Presiding at the trial of the above entitled and numbered cause, having examined the foregoing statement of facts and found same correct, hereby approve the same as the authentic and official statement of facts and order the same filed as a part of the record herein.

L. C. BARRETT,
Special Judge Presiding, 47th Judicial District of Texas.

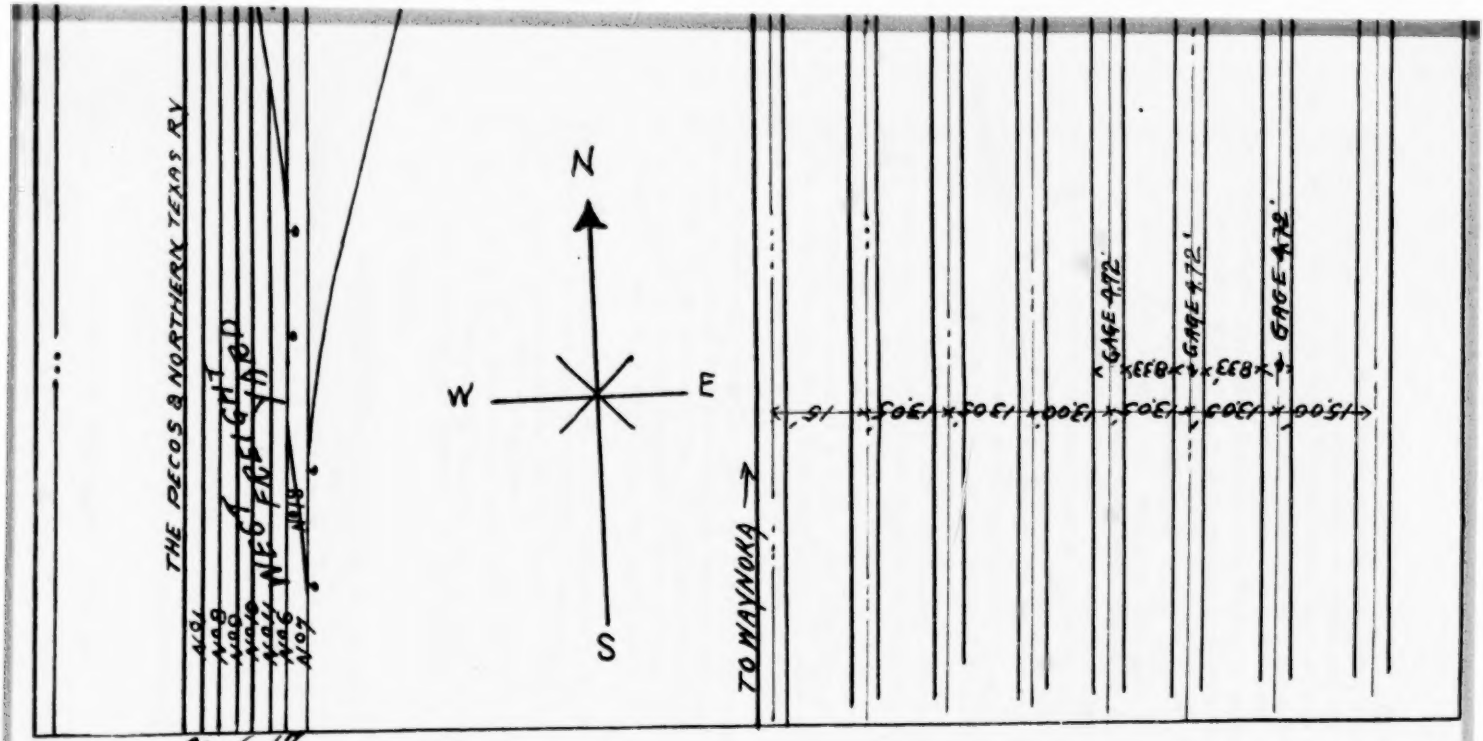
210 State of Texas,
County of Potter:

I hereby certify that the above and foregoing statement of facts was filed in my office on the — day of October, 1910, and that at the same time there was filed in my office an exact duplicate of *this* original.

FRANK WOLFLIN,
Clerk of the District Court of Potter County, Texas,
By M. H. HARDIN, *Deputy.*

(Endorsed:) No. 1204. M. A. Rosenbloom vs. P. & N. T. Ry. Co. Statement of Facts. Filed in Court of Civil Appeals for Seventh Supreme Judicial District of Texas. Jul- 31, 1911. J. M. Oakes, Clerk. Filed in Court of Civil Appeals for Second Supreme Judicial District, Dec. 27, 1910. J. A. Scott, Clerk, by D. B. Trammell, Jr., Deputy. Filed in Supreme Court Jan. 26, 1912. F. T. Connerly, Clerk.

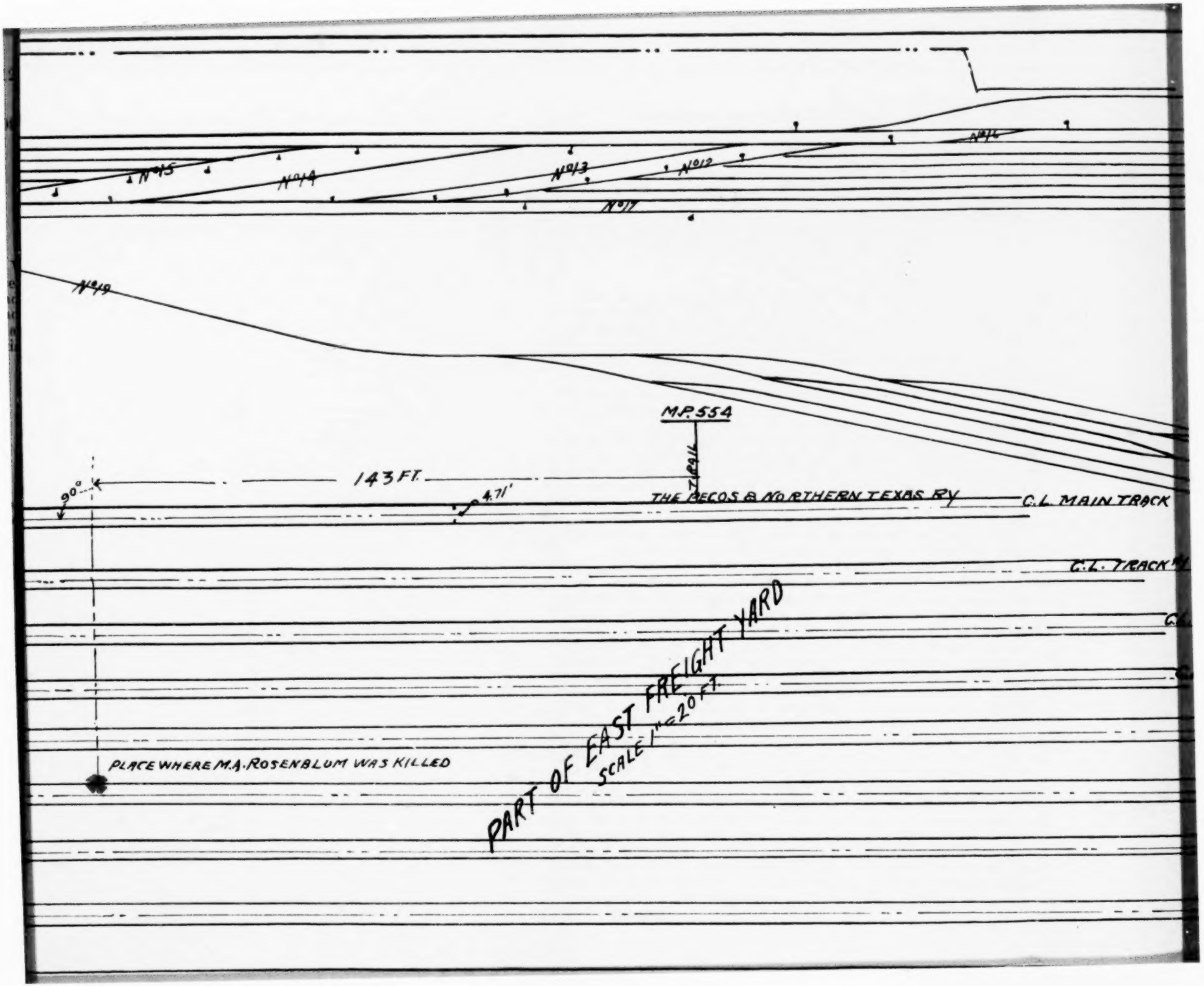
(Here follows map marked p. 211.)



No 613.

Pecos & Northern Texas Ry
v.
Mrs. M. A. Rosenbloom

Op 211


No15
No14
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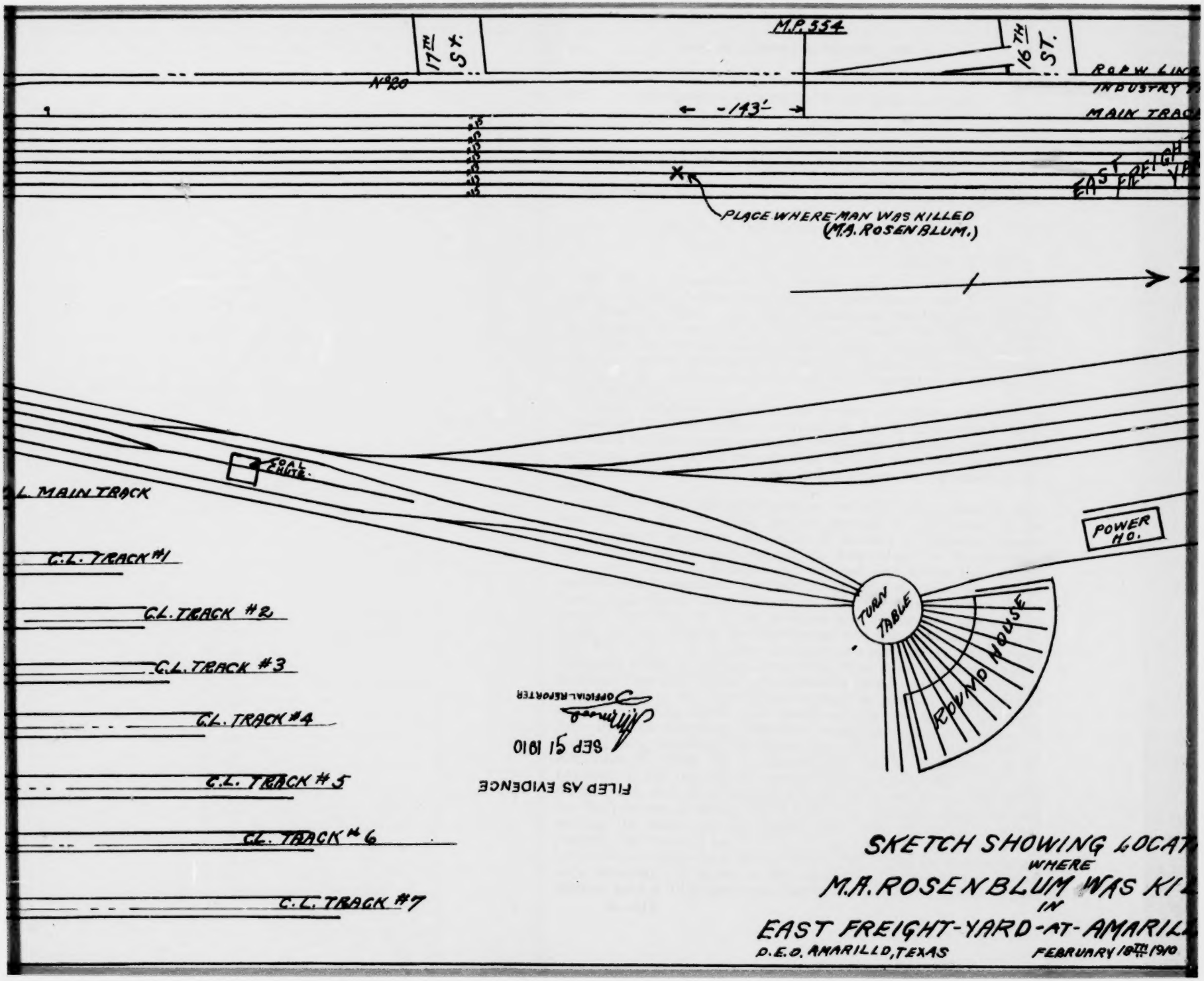
143 FT.
90°
4.71'
THE PECOS & NORTHERN TEXAS RY
C.L. MAIN TRACK
C.L. TRACK
PLACE WHERE M.A. ROSENBLUM WAS KILLED
PART OF EAST FREIGHT YARD
SCALE 1" = 20 FT



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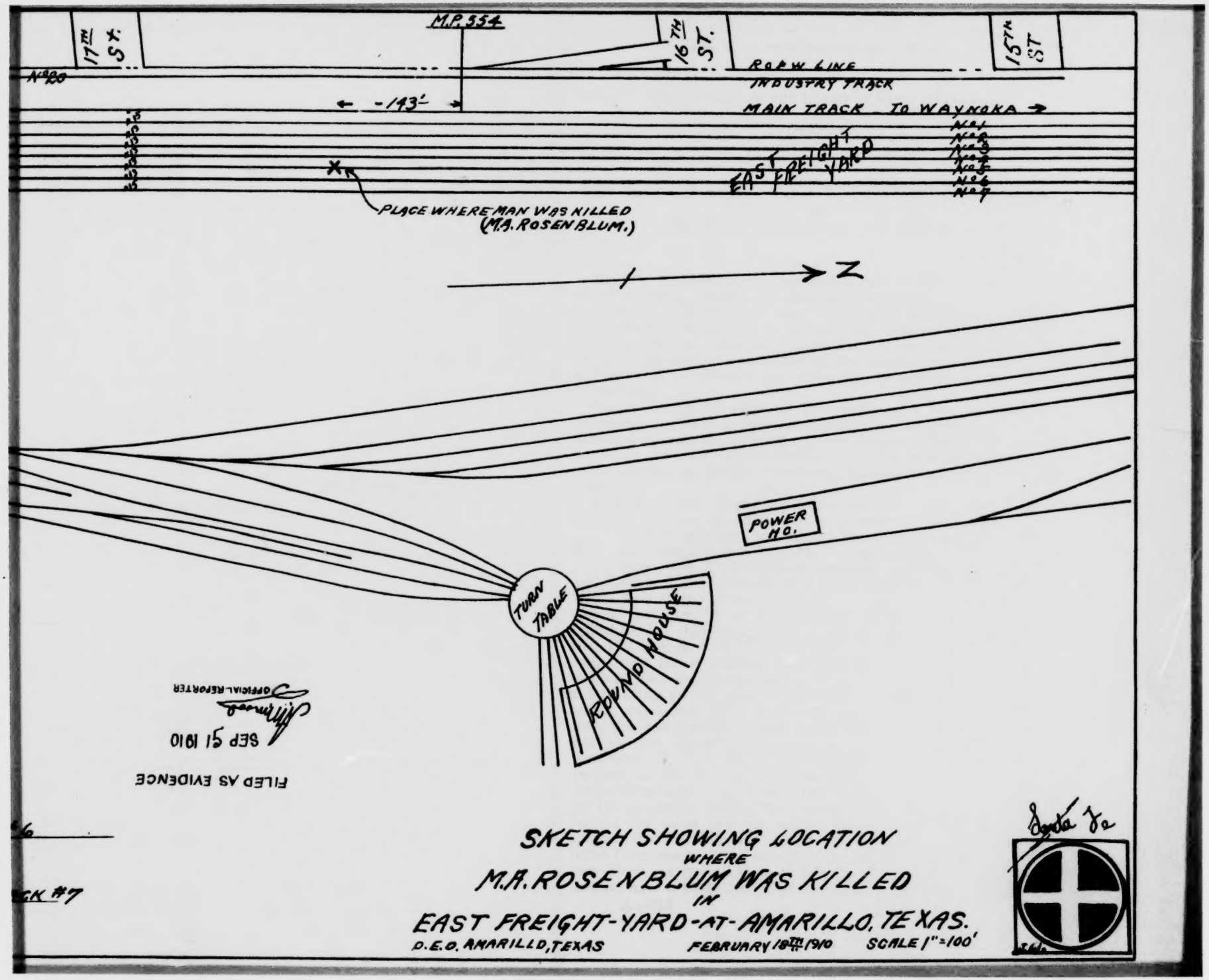
SEP 21 1910
OFFICIAL REPORTER


17TH ST.
M.P. 354
16TH ST.
15TH ST
ROW LINE
INDUSTRY TRACK
MAIN TRACK TO WAYNOKA
← -143' →
EAST FREIGHT YARD
No 1
No 2
No 3
No 4
No 5
No 6
No 7
X
PLACE WHERE MAN WAS KILLED
(M.A. ROSENBLUM.)
N
POWER HO.
TURN TABLE
REDMOND HOUSE
FILED AS EVIDENCE
SEP 21 1910
OFFICIAL REPORTER
SKETCH SHOWING LOCATION
WHERE
M.A. ROSENBLUM WAS KILLED
IN
EAST FREIGHT-YARD-AT-AMARILLO, TEXAS.
D.E.O. AMARILLO, TEXAS
FEBRUARY 18TH 1910
SCALE 1" = 100'
Santa Fe

212 PROCEEDINGS IN THE COURT OF CIVIL APPEALS.

Opinion.

No. 9.

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY, Appellant,
vs.
Mrs. M. A. ROSENBLOOM et al., Appellee-.

October 28, 1911.

Mrs. M. A. Rosenbloom, for herself and as next friend for her minor children, Milton and Matilda Rosenbloom, and for the use and benefit of Minnie and Isaac Rosenbloom, mother and father of her deceased husband, M. A. Rosenbloom, sued The Pecos & Northern Texas Railway Company, in the District Court of Potter county, Texas, to recover damages alleged to have resulted from the negligent killing of M. A. Rosenbloom, while he was engaged in the service of appellant.

From a judgment based on the verdict of a jury, rendered on September 13, 1910, in favor of appellees, for the gross sum of seven thousand dollars, and apportioned two thousand dollars each to the surviving wife and the two children and five hundred dollars each to the mother and father of deceased, appellant has appealed to this court.

Appellee's third amended petition, on which they went to trial, was filed on June 8, 1910, and as grounds of negligence on the part of appellant and right of recovery by appellee, alleged
213 in substance that Mrs. M. A. Rosenbloom is the surviving wife of M. A. Rosenbloom, deceased, and Milton Rosenbloom and Matilda Rosenbloom are their minor children; that Isaac Rosenbloom and Minnie Rosenbloom are the father and mother of deceased; that Mrs. M. A. Rosenbloom sues for herself and as next friend for her children and for the use and benefit of such parents; that The P. & N. T. Railway Company is a corporation, owning and operating a line of railroad, extending from Amarillo southwesterly to Plain View and Texico, own extensive switch yards, etc., at Amarillo, having at the point of occurrence in question seven parallel tracks, extending north and south and located east of its main line; that the defendant used such tracks and yards as a place for starting cars, operating its trains, etc.; that a short time prior to November 27, 1909, M. A. Rosenbloom was in the service of defendant, in the capacity of ticket clerk (properly seal clerk), his duties being such as to require him to be in and about such yards for the purpose of taking the numbers of all cars coming into and leaving the same and for sealing cars and preserving a record thereof; that tracks 4 and 5 of the seven side tracks which are numbered from one to seven consecutively, going from west to east, are only about six feet apart, so that trains in motion running abreast thereon have a little open space between such tracks, barely enough

for a man to stand in and not be knocked down; that on the evening of the 27th of November, 1909, there was a long freight train moving out north on track No. 4 and M. A. Rosenbloom, in the performance of his duties, was between tracks 4 and 5, by the side of said train, getting a record of the cars therein; that while
214 he was there so doing with his face to the north and walking along in the direction such train was moving, and while he was exercising due care and caution, a switch crew, the employees of defendant, pushed a ballast car attached to an engine along on track 5 in the same direction Rosenbloom and such freight train were moving; that such ballast car, which was very wide, was so pushed up behind M. S. Rosenbloom rapidly and with great force and violence, and without ringing the bell or blowing the whistle or giving other warning; that such ballast car, while being so moved, struck M. A. Rosenbloom, knocking him down and ran over him, killing him; that at the time the space between such train on track 4 and ballast car and engine on track 5 was so narrow that a man situated between them, if he happened to move to one side or the other, or to stumble and throw his body to one side or the other, would be struck by the moving cars; that as such ballast car and switch engine so approached Rosenbloom the employees thereof saw him and realized that he was in a perious position and liable to become confused in attempting to escape and get caught by one of such trains and knew that he was liable to side-step or stumble so as to be struck by the moving cars and that if they approached him from behind without his being apprised thereof, he would be placed in a perilous position and was likely to be run over and killed, or could have so known by the use of ordinary care; that so knowing, such switch crew negligently and without regard for the safety of M. A. Rosenbloom, ran such engine and ballast car rapidly and approached him from behind without giving any warning so
215 that when such cars were within eighteen or twenty feet of M. A. Rosenbloom, either because he did not know of the approach of such engine and car, or because he became confused at the unexpected approach thereof, he attempted to cross switch track No. 5 in front of the car and was run over and killed; that the killing of M. A. Rosenbloom was the result of the negligence of defendant in the manner in which such engine and ballast car were operated and the failure of the crew to give him warning; that the crew in charge of such switch engine and ballast car, seeing M. A. Rosenbloom for a long distance before reaching him and when about twenty or twenty-five feet from him, seeing that he was going to cross track No. 5 and realizing that he was in a perilous position and liable to be run over and killed, after discovering and knowing such dangers and perilous position failed and refused to exercise all the means at their command to avoid running over and killing him, failing to warn him, to slacken their speed or in any manner trying to avoid killing him, and that plaintiffs were damaged thereby.

On August 17, 1910, appellant filed its amended answer, being the pleading on which it went to trial and answered appellees' pleading substantially as follows:

1. By plea to the jurisdiction of the court, asserting that because

Rosenbloom was an employee, engaged in interstate commerce, the Federal courts alone had jurisdiction.

2. By general demurrer.

3. By special exception, pointing out: (1) that plaintiffs' petition failed to disclose whether Rosenbloom was engaged in intra-state or inter-state commerce; (2) that it failed to show that plaintiff
216 was entitled to sue in the capacity in which she sued; and (3), that it failed to show that death was the natural and proximate result of the alleged negligence.

4. By general denial.

5. By special plea, setting up, (1) the Federal Employers' liability act, alleging that Rosenbloom was an employee engaged in interstate commerce so that the Federal courts had jurisdiction and plaintiff had no right to sue in the capacity in which she sues; (2) contributory negligence on the part of M. A. Rosenbloom, and (3) assumed risk and negligent manner in which Rosenbloom conducted himself.

The record shows that certain general demurrers and special exceptions urged by appellees were by the lower court sustained and the rulings excepted to by appellant and that a general demurrer and certain special exceptions urged by appellant were overruled and the rulings excepted to by appellant, but as the appellant has failed to assign error in this court on any of said rulings and appellees have briefed their cause as if no such rulings had been made by the court below, on appellant's pleadings, we will dispose of the issues only as raised in and presented by the briefs of the parties respectively on the record.

As appellant filed many assignments of error below not urged in its brief, under the rules, we will consider only those urged in its brief, and to avoid confusion, where we refer to an assignment in this opinion, it will be by its number, according to its order in the brief.

As appellant's second and third assignments, in a general
217 way, bear on the same question, they will be considered together.

Under appellan 's second and third assignments, it is contended that the court below committed reversible error in failing to give appellant's special charges Nos. 1 and 13 respectively, as requested, which are as follows:

Second Assignment:

"The trial court erred in refusing to give in charge to the jury special charge No. 1, requested by defendant, which is as follows: 'The court charges the jury that plaintiffs are not entitled to recover in the capacity in which they sue herein and you are therefore instructed to return a verdict for the defendant.' "

Third Assignment:

"The court erred in refusing to give in charge to the jury special charge No. 13, requested by defendant, which is as follows: 'If M. A. Rosenbloom, at the time of his death, was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and customary work, reasonably carried on by defendant as a part of its business, trans-

porting freight interstate over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict for the defendant on its special plea that plaintiff has no right to maintain this suit in the capacity in which she sues.' "

As a basis for the disposition we make of these two assignments, and in connection with the disposition we shall make of other
218 assignments, we find that the following facts are established and proven by the record, and that the record contains no other facts tending to show that M. A. Rosenbloom was at any time engaged in interstate commerce, towit:

1. Appellant is a railway corporation, owning and operating a line of railroad, extending from Amarillo southwesterly to the New Mexico-Texas state line at Texico, where it connects with the line of the Eastern Railway Company of New Mexico and its line connects at Amarillo with that of the Southern Kansas Railway Company of Texas.

2. On and prior to the 27th day of November, 1909, defendant company was engaged in transporting freight and passengers for hire, being a common carrier, duly organized and chartered, under the laws of the state of Texas, and engaged in a railway transportation business.

3. In connection with its connecting lines, known as the "Santa Fe System" lines and other lines, it was and is engaged in transporting goods and passengers intrastate and interstate, about eighty-five per cent of its traffic for the month of November, 1909, having been interstate and about fifteen per cent thereof intra-state.

4. In connection with its business as such common carrier, it has and owns and owned and was operating extensive switch yards, storage tracks, shops, etc., on and prior to November 27, 1909, at Amarillo, in Potter county, Texas. There were three of its yards, known as the east, the middle and the west yards, respectively.

5. M. A. Rosenbloom became an employee of defendant
219 about the first day of November, 1909, at Amarillo, Texas, in the capacity of seal clerk and continued to be so engaged until the time of his death, which was about six o'clock P. M., November 27, 1909.

6. As such clerk, it was the duty of M. A. Rosenbloom to go in, on and about said yards and there seal all incoming and outgoing trains and take a list of the cars in each such train by car numbers and initials, note the condition of each car, especially as to the door being sealed and seal all unsealed doors, look about icing refrigerator cars, etc., and report cars for icing, etc., and note broken car doors and report losses of freight, etc. Of such matters it was his duty to make a record, which was kept in a book in the yardmaster's office, from which to answer questions and correspondence in the future, making inquiries as to the condition of cars and freight passing through the Amarillo yards.

7. The yards aforesaid were in constant use day and night during the time Rosenbloom was so engaged with switch engines, with their

cars, and incoming and outgoing trains, coming and going constantly.

8. In said middle yard, where Rosenbloom was killed, there were seven switches or yard tracks, all lying east of appellant's main line track, extending practically north and south, parallel and numbered from one to seven inclusive, and consecutively, from west to east.

9. At the time of the death of Rosenbloom there was a long freight train, about thirty-four cars, leaving from track No. 4 in
220 these middle yards to go out at the north end of the line and thence onto Wynoka, Oklahoma, interstate over the line of the Southern Kansas Railway Company. Such train was made up of cars which had come in from New Mexico over appellant's line and was going out over the Southern Kansas to points in Oklahoma, Kansas, Missouri, Illinois and other states, excepting one car, which was well drilling tools, consigned to Panhandle, a point in Carson county, Texas, which would be reached without leaving the state, and which car of tools had originated at Amarillo, Texas, to be used in work on the company's water station at Panhandle.

10. While such train was moving out slowly from said track, Rosenbloom was going down between tracks 4 and 5 by the side of said outgoing train from south to north, for what purpose is not shown by the testimony, nor is it shown what he had immediately preceding his being killed been doing.

11. As such outgoing train and Rosenbloom were so moving, one of the day switch *cars* having coupled an engine on to the south end of a ballast car, somewhere to the south of where Rosenbloom was, came north (the same direction as the outgoing train and Rosenbloom were moving) on track 5, intending to go a few car lengths beyond where they struck Rosenbloom and there couple on to some coal cars and pull them back south on track 5. The crew handling this switch engine and ballast car were not engaged in interstate commerce at the time Rosenbloom was killed.

12. As this switch engine and ballast car were about to
221 pass Rosenbloom from some cause and by some means, which are in dispute, he got in front of the ballast car, was knocked down, run over and killed.

13. Rosenbloom was the husband of Mrs. M. A. Rosenbloom, plaintiff, the father of Milton and Matilda, and the son of Isaac and Minnie Rosenbloom; was 26 years old at the time of his death and earning sixty dollars per month, and during the time of his employment he had resided with his family at Amarillo, Texas.

We are inclined to the opinion that appellant is not in a position under the condition of its pleadings, to urge the questions sought to be raised under these assignments, for the reason that the portion of its pleading challenging the right of appellees to prosecute this suit in the capacity they do, is not under oath, as required by Article 1265, Sayles' Civil Statutes; but as there may be some question about the correctness of this view, we will dispose of them as if appellant was in a position legally to urge them.

As appellees' pleadings allege no fact tending to show that M. A. Rosenbloom was at any time engaged in interstate commerce and

the facts above stated contain everything that can be fairly drawn from the record which could in any way be construed as even tending to show that he was so engaged at the time he received the injuries resulting in his death, we think the evidence wholly fails to raise the issue sought to be submitted in special charges Nos. 1 and 13, the refusal to give which is complained of under assignments 2 and 3 respectively.

222 Under the authorities cited by appellant, if the evidence had affirmatively shown that Rosenbloom, at the time of receiving the injuries which resulted in his death, was actually engaged in the performance of his duties, in connection with the freight train which was just leaving and which was made up of cars containing interstate as well as intra-state freight, without showing which character of freight he was then giving his attention to, and if the testimony had tended to show that those engaged in the operation of the switch engine were also engaged in interstate commerce, we would incline to the opinion that a question was raised as to whether or not Rosenbloom was engaged in interstate commerce, as an employee at the time he was killed; or if the evidence, as a whole, had tended to show that at the time Rosenbloom was killed he was as an employee of appellant, performing his duties in connection with one of the cars laden with interstate freight, and the evidence as a whole had also tended to show that those operating the engine and ballast car were engaged in interstate commerce, we would incline to the opinion that a question had been raised as to whether or not Rosenbloom was engaged in interstate commerce within the meaning of the Federal law, when considered in connection with the duties pertaining to his employment.

The evidence, however, taken as a whole, as we view it, fails to raise such an issue as it would appear from the language used by District Judge Whitson, in the case of Zykos vs. Oregon R. & Nav. Co., 179 Fed. 893, that it would be necessary for those operating the engine and ballast car, as well as Rosenbloom, to have been engaged in interstate commerce before the questions sought

223 to be presented by appellant really existed.

In discussing the facts and circumstances necessary to entitle an employee to the benefit of the Federal Employe-s' Liability Act, Judge Whitson, in the case above cited, used the following language: "It is not necessary, in view of the facts disclosed by the complaint, to go further then to hold that interstate and intra-state service are separable by upholding liability when the injury results from the negligence of fellow servants engaged in interstate commerce and denying it when resulting from the negligence of an intra-state employee to one engaged in interstate commerce." Again in the same opinion, the same judges uses the following language: "That it was the purpose to make an interstate carrier liable to an employee engaged in interstate commerce for the negligence of a fellow servant also engaged in such commerce, is beyond controversy."

From the above language it would appear that the proper construction of the Federal statute would be that before a Federal question were raised the evidence must tend to show, not only that the

injured party was engaged in interstate commerce but that the servant inflicting the injury, which in law is the principal, was also so engaged. We think the reasoning in the majority opinion in the case of Howard vs. Illinois Central Railway Company, 107 U. S., 463, sustains the proposition just announced.

If, however, it were conceded that the evidence tends to show that Rosenbloom had been engaged in interstate commerce immediately before he was killed, by checking the outgoing freight train or inspecting the seals of cars therein and otherwise performing
224 his duties under his employment in connection therewith, and the evidence had also tended to show that those in charge of the engine and ballast car were engaged in interstate commerce, as the evidence shows without question that at the time Rosenbloom was killed the outgoing freight train was leaving the yards at a speed of from eight to ten miles an hour, that Rosenbloom had ceased to perform any service in connection therewith and was going from said train, and there is no evidence tending to show what his purpose in so doing was, unless it tends to show that he was attempting to cross track 5 to reach a place of safety, we think it cannot be successfully contended that he was, at the time he was killed, engaged in interstate commerce within the meaning of the Federal statute, unless the mere fact that his general duties required him to perform service in connection with interstate commerce, as well as intra-state commerce in Amarillo, coupled with the further fact that during the month of November, 1909, of the total business handled by his employer in Amarillo, about eighty-five per cent of same was interstate commerce, and the remaining fifteen per cent was intra-state commerce, and the further fact that the duties of Rosenbloom required that he keep a record of such data as he might procure from having investigated and inspected the outgoing train, would have the effect of proving or tending to prove that as a result of the nature of his employment, he was engaged in interstate commerce within the meaning of the Federal Statute, at the time he was killed; this we do not believe, as under our governmental policy, the Federal government, including the Federal courts, acquire jurisdic-
225 tion only when the facts necessary to bestow such jurisdiction appear with reasonable clearness and certainty. For the reasons stated, we hold that the evidence did not raise the question of whether or not Rosenbloom was at the time he was killed engaged in interstate commerce, and we therefore overrule appellant's second and third assignments of error.

Under appellant's first assignment complaint is made that the court below refused to give in charge to the jury special charge No. 10, requested by it, which is as follows: "If the jury find from the evidence that defendant's engineer and switch crew in charge of the switch engine and ballast car that ran over and killed M. A. Rosenbloom, or any one or more of them were negligent, as is alleged by plaintiff, and that such negligence was a producing cause of the death of M. A. Rosenbloom, and if you also find that M. A. Rosenbloom was himself guilty of negligence and that his negligence, concurring with that of such employee or employees of defendant was a producing cause of his death, and if because of such negligence,

if any, on the part of defendant's employee or employees you determine to find for plaintiff-, then it will be your duty to diminish the damages you find in proportion to the amount of negligence attributable to M. A. Rosenbloom."

The court in his charge to the jury, confined appellees' right to recover to the doctrine of discovered peril, as indicated below, in that after defining ordinary care, negligence and proximate cause in the first three paragraphs of the charge, he in the fourth paragraph charged the jury as follows: "If you find and believe from a
226 preponderance of the evidence that before the ballast car struck the said M. A. Rosenbloom, that the said M. A. Rosenbloom was in peril and danger of being struck by a ballast car and engine attached and you further believe from the evidence that the employees of the defendant company in charge of said ballast car and engine attached, before the said M. A. Rosenbloom was struck by said ballast car, discovered that the said M. A. Rosenbloom was in peril, and that the said employees so discovered the peril of the said M. A. Rosenbloom in time to have avoided running against him by the exercise of ordinary care and that the employees operating said engine and ballast car killed the deceased, after so discovering the peril and danger to the said M. A. Rosenbloom, if they did so, failed to exercise ordinary care to avoid running over and killing him, then and in such event you will find for the plaintiff-." No other portions of the charge given authorized a recover- by appellees.

A proper disposition of appellant's first assignment depends upon the construction that should be given section 2 of an act of the legislature of the state of Texas, passed in 1909, found at page 280 of the session acts, which reads as follows: "That in all actions wherever brought against any such common carrier or railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damage shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

227 In properly construing any legislative enactment, especially where the act because of the language used is susceptible of more than one construction, it is necessary to know what the law was on the same subject before the act was passed and if possible to learn the corrections sought to be made of the existing law, that is the evil sought to be remedied.

We will therefore first decide what the law was bearing on the question under consideration before the passage of said act of 1909, and from that law, as construed by the courts, ascertain, if possible, what evil the legislature sought to remedy by the passage thereof.

Prior to 1905 it had been the law in this state for many years that no recover- would lie for damages or injuries resulting in death of an employee where the injury or death resulted from one of the risks ordinarily incident to the employment,—known as the Doctrine of Assumed Risk: also that as a general proposition or rule,

where both the employer and the employee were guilty of negligence proximately causing the injury or death, neither could recover,—known as the doctrine of Contributory Negligence; but for many years prior to the passage of said act of 1909 there had been recognized by the courts of this state, as there had been by the courts of many of the other states, and by the Federal courts, an exception to this doctrine of contributory negligence, to the effect that even if both parties were guilty of negligence, if one of them actually discovered the perilous position in which the other had been placed, even as a result of his own negligence or wrong, it was the
228 duty of the one making such discovery to use a high degree of care thereafter to avoid injuring or killing the other, and a failure to use such care, if the proximate cause of the injury or death, subjected such one so inflicting such injury or death to a recovery for damages, arising from such independent act of negligence;—called the Doctrine of Discovered Peril, or Last Clear Chance.

Our laws thus standing, the legislature of this state, in 1905, passed a law on the subject of assumed risk, which is as follows:—"That in any suit against a person, corporation or receiver, operating a railroad or street railway, for damages for the death or personal injury of an employee or servant, caused by the wrong or negligence of such person, corporation, or receiver, *that* the plea of assumed risk of the deceased or injured employee, where the grounds of the plea is knowledge or means or knowledge of the defect and danger which caused the injury or death, shall not be available in the following cases:

First. Where such employee had an opportunity before being injured or killed to inform the employer or superior intrusted by the employer with the authority to remedy or cause to be remedied the defect and does notify or cause to be notified the employer or superior thereof, within a reasonable time, provided it shall not be necessary to give such information where the employer or such superior thereof already knows of the defect.

Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger
229 and in such case it shall not be necessary that the servant or employee give notice of the defect as provided in sub-division 1 hereof."

Referring to the effect this act had on the Assumed Risk Doctrine in this state, Justice Brown, speaking for the Supreme Court, in the case of H. & T. C. Railway Co. vs. Alexander, 119 S. W., 1135, uses this language:—"The statute did not abolish the rule of the law that one who enters the service of a railroad company assumes all risks which are ordinarily incident to his employment, also the risks which are known to him or that he should discover in the proper discharge of his duties. The effect of that act is to deny to the railroad company the defense of assumed risk in case 'the defect or danger' which causes the injury was such that a person of ordinary prudence under like circumstances 'would have continued in the service.' The change is favorable to the employee, which we

cannot explain better than to contrast its application with the previous rule as heretofore applied." The court then proceeds to refer to the fact that in the case of Railway Company vs. Drew, 59 Texas, 10, that court had held that Drew was not entitled to recover because of the law as it then existed, and then announced the proposition that under the law as it existed when the Alexander case was decided, Drew would have been entitled to recover by showing that the condition of the locomotive and the surrounding circumstances were such that a prudent man, situated as he was, would have used the locomotive as he did; the Drew case having been one in which the engineer had used an engine without a pilot, knowing that
230 the engine had no pilot, and the injuries having resulted to him because of the want of a pilot.

On April 13, 1909, the Legislature passed a law which we think enlarges the rights of employees and imposes more burdens on the employer than had prior thereto existed under the contributory negligence doctrine, above announced. Section 2 of which is as follows:—"That in all actions hereafter brought against any such common carrier by (or) railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violations by such common carrier of any statute for the safety of employees contributed to the injury or death of such employee."

An inspection of the entire act, from which Section 2 is copied above, shows that no act which had not been formerly held to be contributory negligence could under this act be held to be such.

From the foregoing it would appear that at the time the act under consideration was passed, the doctrine of assumed risk formerly existing had been as a result of the act of 1905, as construed in the case of H. & T. C. Ry. vs. Alexander, so modified as to permit
231 a recovery by the employee under circumstances which would have barred a recovery prior thereto and apparently so modifying the former doctrine of assumed risk that it practically became one of contributory negligence as to matters mentioned in the act.

No court, so far as we are aware, has held that the Act of 1905 or of April 13, 1909, in any way affected the doctrine of discovered peril above announced and we fail to see how rights under this doctrine could be affected by either the Act of 1905 or of 1909, since the very doctrine itself presupposes that the injured party had been guilty of a wrong but for which the injury would not have occurred, and the wrong may have been negligence on his part.

The right of recovery in discovered peril cases appears to be based on the idea that the injury has resulted in part from an independent cause, arising after the wrong on the part of the in-

jured person, though the injury would not have occurred but for said wrong. Judge Denman, speaking for the Supreme Court of this state, in the case of Texas & Pacific Railway Company vs. Breadow, in discussing the right of recovery under this doctrine, uses this language: "If defendant, through parties in charge of the engine, knew of Breadow's peril in time to have avoided same, such knowledge imposed upon it the new duty of using every means then within its power consistent with the safety of the engine, to avoid running him down; and a failure so to do would render it liable, notwithstanding he may have been guilty of contributory negligence in being exposed to the peril. This new duty and liability for its breach is imposed upon principles of humanity and public
232 policy to prevent what would otherwise be, as far as civil liability is concerned, the licensed destruction of persons negligently exposing themselves to peril."

It being clear that neither the act of 1905 nor that of 1909 *were* intended to enlarge the defenses of employers or to destroy any right theretofore existing in the employee which had existed prior thereto, and to give the act of 1909 the construction contended for by appellant would work a destruction of a right enjoyed by employees prior thereto, we conclude that the act of 1909, in no way limits the right theretofore existing in discovered peril cases, as to the employes and for these reasons we overrule appellant's first assignment of error.

Under appellant's fifth assignment, complaint is made that the court erred in giving in charge to the jury paragraph 4 of its charge, which has herein been copied, it being claimed that said portion of the charge assumes that a failure on the part of appellant's employees to exercise ordinary care to avoid running over Rosenbloom was negligence and the cause of his death and does not require the jury to find from a preponderance of the evidence that defendant's servants were in fact negligent and that such negligence caused the death of Rosenbloom, as a condition precedent to returning a verdict for plaintiff-.

We have critically examined the portion of the charge complained of and think it not subject to the objections made: we also think it submitted to the jury the law of the case under the evidence in a substantially correct form and substance and in as favor-
233 able manner as appellant's rights under the law warranted. We therefore overrule its fifth assignment of error.

Complaint is made by appellant under its sixth assignment that the court below erred in failing to give in charge to the jury its ninth requested special charge, which is as follows:—"If while the switch engine and ballast car were being run along down track No. 5 the deceased M. A. Rosenbloom, was seen so dangerously near the track ahead of him as to make it reasonably appear that if the engine and car kept on running towards Rosenbloom and he did not get out of the way, he might be struck by the car and hurt or killed, it was the duty of the engineer and switch crew to give him some warning of the approach by blowing the whistle, ringing the bell, hollowing at him or some other warning, such as they could

reasonably expect under the circumstances would be sufficient to attract the attention of a reasonably prudent person in possession of his natural senses and desirous of securing his own saftey. After giving such signal or warning, if they did give a signal or warning, said engineer and crew had a right to presume and rely upon M. A. Rosenbloom heeding such signal or warning and exercise such reasonable care to clear the track for his own safety as a reasonably prudent person, in the possession of all his natural senses and faculties would have exercised under the existing circumstances and to proceed with the engine and car along said track accordingly, until it became apparent to such engineer and switch crew (if it did) that M. A. Rosenbloom either would not or could not clear said track and save himself from injury by such car and engine.

234 If said engineer and crew discovered said Rosenbloom, on or so dangerously near said track, that it was reasonably apparent to them that he would not or could not save himself by getting out of the way of such passing engine and car, but would be struck and injured if they kept going, it immediately upon so learning that Rosenbloom was in such perilous position and either would not or could not save himself, became the duty of such engineer and crew to use all means at their command, consistent with the safety of others, to avoid running on to and injuring the said Rosenbloom; but such duty did not arise until it became known and apparent to such engineer and crew that Rosenbloom was in such danger and that he could not or would not save himself. Unless you find from the evidence that Rosenbloom was so in danger and by said engineer and crew discovered to be in such danger, when he could not or would not save himself by the use of such efforts as a reasonably prudent person in possession of all his natural faculties and senses would have exercised for his own safety, and that such engineer and crew in charge of such switch engine and ballast car failed to exercise all means at their command, consistent with the safety of others, to avoid striking and injuring him and that such failure on their part was the cause of the death of Rosenbloom, then you will find for the defendant."

We think the court below was warranted in refusing to give in charge to the jury said special charge, because same was so worded as to required that appellant's engineer and crew (which of course included each member of the crew pulling the engine) knew

235 of the peril of Rosenbloom before the engineer or either member of the crew was required to exercise care to avoid injuring Rosenbloom; this is not the law but it was the duty of any one of the members of said crew, on discovering that Rosenbloom was in peril, to at once use the means at hand to avoid the injury and not wait until each member or any other member of the crew discovered his peril.

It was the evident purpose of appellant's counsel to have the special charge inform the jury in substance that the mere fact that the crew or some member thereof, saw Rosenbloom on or near the track while they were yet some distance from him and before he was in any peril, would not warrant a recovery, but that a recovery could

only be had if some member of the crew failed to exercise proper care to avoid injuring him, after actually discovering that he was in peril, and that such failure to act, resulted in the injury as was held in the case of Texas & Pacific Railway Company vs. Roberts, 37 S. W., 870.

Under the facts in the case, such an issue was perhaps raised but we think it was fairly submitted in special charge No. 9, prepared by the court and given to the jury, which is as follows:—"Gentlemen of the Jury: If you find that deceased was in peril and such peril if discovered by the servants operating the ballast car and engine, then said servants had the right to presume that said deceased would get off the track unless it became apparent to them he would not do so; now if you find that defendant, through the servants operating the engine and ballast car, saw deceased on the track, and in dan-
236 ger and they warned him and you fail to find said servant realized that he would not get off the track or out of the way in time, by the exercise of ordinary care to have avoided injuring him, after such warning, you will find for the defendant."

We do not hold that this charge was technically correct, but we do hold that it sufficiently covered the issue raised in appellant's special charge refused and that it submitted the law in as favorable a manner as appellant's rights warranted and that it did not mislead the jury to appellant's detriment. For the reasons given, the sixth assignment will be overruled.

Under its seventh assignment, appellant complains of a failure to give in charge to the jury its twelfth special charge, which is as follows:—"The court charges the jury that the duty of the defendant's engineer and employees in charge of the switch engine and ballast car in question to exercise care to avoid striking and killing M. A. Rosenbloom in a position of discovered peril, would not arise until M. A. Rosenbloom was in fact in a perilous position and until he was known by such employees of the defendant to be in such perilous position, and that he could not or would not be able to extricate himself from such perilous position; and unless they discovered him in such perilous position and failed to exercise due care to avoid injuring him after so discovering him in such perilous position, you will find for the defendant."

We think the court did not err in refusing this special charge, be-
cause it imposed no duty on any one of the employees to act
237 unless and until all knew of Rosenbloom's peril, and therefore the seventh assignment will be overruled.

Under appellant's fourth assignment, complaint is made that the court erred in overruling the twenty-ninth ground in its motion for a new trial, which is as follows:—"The verdict and judgment of the jury are contrary to and unsupported by the law and the facts in this cause, for this: (*a*) The evidence entirely fails to show any actionable negligence upon the part of the defendant, its agents, servants and employees, in the manner or form as stated in plaintiff's original petition; (*b*) the evidence shows conclusively that the deceased, M. A. Rosenbloom, was negligent and that his negligence, without any concurrent negligence upon the part of the defendants

or its agents or employees, was the sole producing cause of the death of M. A. Rosenbloom; (*c*) There is absolutely no testimony whatever to show that M. A. Rosenbloom became and was in a perilous position from which he could not and would not extricate himself and that the engineer or other employees of the defendant, in charge of the switch engine and ballast car in question saw or discovered M. A. Rosenbloom in such perilous position, failed to exercise due care to avoid injuring him; (*d*) The evidence shows clearly that M. A. Rosenbloom walked upon the track immediately in front of the ballast car and that defendant's employees, members of the switch engine —, especially the engineer, could not possibly after discovering M. A. Rosenbloom on the track, or going on the track in front of the car, have avoided striking him with the ballast car in question."

238 As the evidence shows, without contradiction, that the operatives of the switch engine and car that ran over and killed Rosenbloom, discovered that he was in a perilous position while he was yet somewhere between ten and thirty feet from any portion of the engine or car attached thereto, and the evidence in the record is sufficient to sustain the conclusions that the engine and car could have been stopped with the means at hand, by the proper use thereof, within less even than seven feet, and that the engine and car were at the time in good condition but that they ran about sixty or seventy feet after Rosenbloom's perilous position was actually discovered, and there is also evidence in the record sufficient to sustain the conclusion that if the engine and car had been stopped in less than thirty feet after Rosenbloom's perilous position had been actually discovered by appellant's employees, in charge of said engine and car, Rosenbloom would not have been injured or killed, no error was committed in overruling sub-division (*a*) of the twenty-ninth ground of appellant's motion for a new trial.

While the evidence does tend to show that Rosenbloom had been guilty of negligence in going on the track at the time and under the circumstances, yet there is evidence in the record, if believed by the jury, sufficient to support the conclusion that appellant's employees in charge of the switch engine and car were guilty of negligence in having failed to avoid running over and killing Rosenbloom after they actually discovered his peril and for these reasons the court did not err in overruling sub-division (*b*)

239 of the 29th ground of appellant's motion for a new trial.

We do not believe it necessary for appellees to have shown, not only that appellant's servants in charge of the switch engine and car discovered that Rosenbloom was in peril, but also to prove that he could not or would not extricate himself before they were required in law to take steps to avoid injuring or killing him, and as other portions of the complaint made in sub-division (*c*) of the twenty-ninth ground of the motion for a new trial has been disposed of in what we have said in disposing of sub-division (*a*) thereof, we think the court did not err in overruling said sub-division (*c*).

What we have said in disposing of sub-division- (*a*) and (*b*) of the

twenty-ninth ground of appellant's motion for a new trial, necessarily results in our holding that the court did not err in overruling sub-division (*d*) thereof, and as this disposes of each ground of objection urged under appellant's fourth assignment, adversely to it, we overrule said assignment.

Believing that the material issues arising on the trial of the cause were submitted to the jury by the court in its charge in such form and substance as to correctly inform the jury as to the law of the case, and the jury having found against appellant on the facts, and there appearing no reversible error in the record, the judgment of the trial court will be affirmed and it is so ordered.

GRAHAM,
Chief Justice.

(Endorsed:) With App. No. 7519. Pecos & N. T. Ry Co. vs. Mrs. M. A. Rosenbloom, et al. Opinion. Filed in Court of Civil Appeals for Seventh Supreme Judicial District of Texas, Oct. 28, 1911. J. M. Oakes, Clerk. Filed in Supreme Court, Dec. 28, 1911. F. T. Connerly, Clerk.

240 *Judgment of the Court of Civil Appeals.*

October 28, 1911.

From District Court, Potter County, Oct. 28, 1911.

No. 9.

PECOS & NORTHERN TEXAS RY. CO. et al.
vs.
Mrs. M. A. ROSENBLOOM et al.

Opinion by Mr. Graham, Chief Justice.

This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed, that the appellees, Mrs. M. A. Rosenbloom, Milton Rosenbloom, Matilda Rosenbloom, Isaac Rosenbloom and Minnie Rosenbloom, do have and recover of and from The Pecos & Northern Texas Ry. Co. and its Sureties, Ray Wheatley and Chas. A. Fisk, the amounts as adjudged below, together with all costs in this behalf expended and this decision be certified below for observance.

241 *Motion for Rehearing.*

In the Court of Civil Appeals, Seventh Supreme Judicial District of Texas.

No. 9.

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY, Appellant,
vs.
MRS. M. A. ROSENBLOOM, Appellee.

Now comes appellant and moves the Court to set aside the judgment rendered herein on the 28th day of October, 1911, affirming the judgment of the Trial Court, and to grant it a rehearing herein, and, upon such rehearing, to reverse the judgment of the Trial Court and here render judgment for appellant; and, in support of this motion, shows to the Court as follows:

1. This Court has erred in overruling assignment "I" presented in appellant's brief, 19 in the record, and the proposition thereunder submitted, as such assignment and proposition are presented on pages 22 to 25 of such brief.

It was error for this Court to overrule such assignment and proposition; because,

(*a*) The trial court erred in refusing to give in charge to
242 jury special charge No. 10 requested by appellant, wherein request was made for the Court to charge the law of contributory negligence and to consider the relative degree of care exercised by M. A. Rosenbloom and appellant's other employees in determining the amount of their verdict, in the event they found any damages for plaintiff.

(*b*) Such special charge correctly presented the law of the case, arising upon the pleadings and the facts, applying the statutory law; and the Court's charge did not properly present and charge upon such issue.

2. This Court has erred in all those parts of the opinion filed herein which discuss and pass upon said assignment "I" presented in appellant's brief, 19 in the record, and the proposition thereunder submitted. Such parts of said opinion are erroneous in respects and for reasons as follows:

(*a*) That part thereof which holds that section 2 of the act of 1909, found at page 280 of the Session Acts, is susceptible of more than one construction, is erroneous; because said act is plain, unambiguous, and can have but one meaning, which is plain and apparent. Such meaning expressed in other terms, is, that the legislature, in giving to employes of railroads and their heirs, a right of action for damages resulting from personal injuries, which they did not have at common law, intended that such action should exist regardless of the fact that the employee injured may have been negligent, and further intended, that if the injured employee and other

243 employees of the company should be guilty of negligence concurring to produce the injury, the amount of recovery to which the injured party or his heirs should be entitled, should be lessened as his negligence, compared with that of the other employees, increased.

(*b*) Those parts of said opinion, which purport to state the law of "assumed risk" and "contributory negligence" as the rules applicable thereto existed prior to the act of 1909, are erroneous, for that such opinion does not correctly state such rules and there makes a misapplication thereof to the facts of this case. Prior to the recent legislative enactment, as employee who accepted employment from a railway company assumed all risks of danger reasonably incident to the line of work in which he engaged. The company was, and is yet, bound to exercise reasonable care to provide him a reasonably safe place to work and reasonably safe tools with which to work. If the company failed in either and a danger thereby arose if it was open and apparent or known to the employee so that he could or should have avoided injuring himself after the company's want of due care had caused the dangerous place or tool, and he knowingly went ahead and encountered the danger when he might have avoided it, he "assumed the risk" of the danger and could not recover if injured. If the company's other employees were negligent in some act and the injured employee was also negligent so that his negligent act became a proximate, intervening cause, and concurring with the negligence of the other employees produced injury to him, he was said to be guilty of "contributory negligence" and could not recover, because of his own wrong. There has

244 been much discussion as to whether his act should have been "an intervening proximate cause without which his injury would not have occurred" or merely a "concurring" cause; but that is not an issue here. The statute in question had no reference to "assumed risk," but merely intended to modify or change the former statute giving a right of action for damages resulting from personal injuries in derrogation of the common law, in so far as it relates to railroad employees, so as to make the law of "comparative negligence" apply in cases where both parties are shown to have been negligent.

(*c*) Those parts of said opinion which discuss and seek to apply the "doctrine of discovered peril," are erroneous, because such opinion does not properly state such rule and makes a misapplication thereof to this case. A man carelessly and negligently gets on a railroad track and goes to sleep, when he knows a train is liable to come along before he awakes and gets out of its way, he is, of course, guilty of negligence; and his negligence necessarily precedes any negligent act of the trainmen who may subsequently come along. If, while he is on the track, as the result of his negligence, a train comes along and the engineer sees him there in a dangerous position, realizing that he is asleep, so that unless the train is stopped he will be killed, the engineer must use reasonable care, under the existing conditions, to avoid running over and killing him. The engineer has had the "last clear chance" to save a human life and

the dictate of "humanity" demand that he exercise "reasonable care" to save the life of even a worthless human being,—the
245 "humane doctrine." Where such party is up and going, not asleep or in some other state of inaction known to the engineer, the movements of the train and the party in danger are concurrent in time, and the engineer has a right to presume that such party will exercise his senses and direct his movements for his own safety and to keep his train going until he discovers that the man's position is perilous and such as that he probably cannot or will not save himself. When the engineer discovers such danger, and not 'till then, his duty arises to exercise due care to avoid the impending injury. The time for the party in danger to exercise care is "past history," so to speak. Although his negligence may have been and was the first cause in the chain of events leading up to the present dangerous condition, it is a past and remote cause. The engineer is called upon to deal with a present condition and the "humane doctrine" requires of him, that he take advantage of "the last clear chance" and avoid the impending injury if he can do so by the exercise of reasonable care; and if he fails, his company will not be excused simply because a prior and remote act of the man in danger may have been the first in a chain of acts and circumstances which have resulted in placing the life or limb of a human being at his disposal and subject to his care.

But how or why does this rule, which existed prior to the statute, create an exception to the legislative act? The act is general in its terms and recognizes no exceptions. The charge requested by appellant and refused by the Court prevented the law as writ-
246 ten, and had it been given would have left the jury to estimate the remoteness or proximity of causes as well as the comparative degree of negligence chargeable to the different employees? If the rule as it existed prior to the act is inconsistent with the legislative intent, as evidence- by the very clear and explicit terms of the act, the rule is simply abrogated by the act.

Clearly the purpose of the law as shown by its own wording, was, in all cases where railroad employees are injured as the result of negligence of other employees, to make the company liable and to regulate the amount of recovery, making it in proportion to the relative, or comparative negligence of the injured and injuring employees. If so there is no escape from the conclusion that it was error to refuse the charge in question.

There is, in the opinion, further misapplication of this rule of "discovered peril"; because as set out in appellant's original and supplemental briefs, the facts show concurrent acts, Rosenbloom's acts alone being negligent.

(*d*) Those parts of the opinion which seek to apply the rule of "assumed risk" to the facts of this case as a reason why special charge No. 10 is supposed to have been correctly refused, and the reference to the opinion of Justice Brown in H. & T. C. Ry. Co. vs. Alexander, 119 S. W., 1135, are erroneous, in that such rules are foreign to the question at issue and have no application thereto, neither as precedent nor by rational analogy.

(*e*) At common law no right of recovery exists in favor of the legal representatives of a deceased person on account of per-
247 sonal injuries causing his death. This rule necessarily resulted from the rule that personal actions died with the person. But our Legislature, considering that all rights a man would have had to recover for injuries, had not the injuries resulted in death, should exist in favor of those who would have derived a pecuniary benefit from his living, where the injuries resulted in death, had passed a statute giving such right of action to such parties. The right thus created is a statutory right. Being statutory, it exists only upon the terms and conditions and with the limitations provided by the statute law creating it. Parties, therefore, going into Court and there claiming such right of recovery, must show themselves entitled to recover under the terms and conditions of the statute they rely upon. The act of the legislature in question so limits and modifies the statutes giving a right of action to the survivors of an employee of a railroad company when death has been caused by the negligence of the company, as that their recovery is, as to the amount recoverable, in proportion, greater or less, as his negligence did not or did contribute to his death. The statutes make no exceptions and the courts have no right to do what the statutes have not done.

3. This Court has erred in overruling assignment "II" presented in appellant's brief, 15 in the record, and the five several propositions thereunder submitted, as such assignment and propositions are presented on pages 25 to 30 inclusive, of such brief.

248 It was error for the court to overrule such assignment and propositions; because,

(*a*) The trial court erred in refusing to give in charge to the jury special charge No. 1 requested by defendant, a peremptory charge to find for the defendant, because the testimony shows conclusively, that M. A. Rosenbloom, at the time of his death, was an employee of a railway company engaged in interstate commerce and himself, as such employee, so engaged.

(*b*) The trial court erred in refusing to give in charge to the jury special charge No. 1; because plaintiffs' cause of action, if any they have, arose under the Federal Employer's Liability Act, to the exclusion of the State law.

(*c*) The trial court erred in refusing to give in charge to the jury special charge No. 1, requested by defendant; because plaintiffs' cause of action, if any they have, having arisen under the Federal law, suit could be maintained only by a personal representative of deceased, his administrator or executor as such and not by his surviving wife and children as survivors.

(*d*) The trial court erred in refusing to charge the jury peremptorily to find for defendant; because there was and is a variance between the allegations and the proofs, in that plaintiffs sue under the State statute, which authorizes them all to sue as dependent survivors of the deceased, while the evidence shows conclusively that M. A. Rosenbloom was an employee of a railway company engaged in interstate commerce, and himself so engaged as such employe, so that

only his person- representatives, if any, has a right of action,
249 for the use of his wife and children to the exclusion of his father and mother.

(*e*) The trial court erred in refusing to charge the jury peremptorily to return a verdict for the defendant; because the testimony is insufficient to show actionable negligence on the part of defendant, or its employees.

4. This court has erred in all those parts of the opinion filed herein which discuss said assignment "II," 15 in the record, and the propositions thereunder, which are considered in said opinion with assignment "III" in appellant's brief, 21 in the record. Such parts of said opinion are erroneous for reasons as follows:

(*a*) That part of said opinion which recites "that the record contains no other facts tending to show that M. A. Rosenbloom was at any time engaged in interstate commerce" those enumerated therein and numbered from 1 to 13 inclusive, is erroneous; because plaintiffs' petition alleges "that, as was the duty of her said husband, M. A. Rosenbloom, he was in said yards between tracks Nos. 4 and 5, getting the numbers of the cars in said freight train; that while her said husband was engaged in said duty said freight train was moving out on its regular run and was moving out along said switch track No. 4, * * *, and was walking along by the side of said freight train for the purpose of observing and getting the numbers of the cars in said freight train while the same was pulling out;" and further alleges, "that while said freight train was moving out her said husband was engaged in the performance of his regular duties, as above stated," (Tr. p. 4), and such allegations have been by defendant conceded for the purposes of this issue, and the facts go to
250 show, if they do not positively establish such facts as alleged and above quoted. The recitals of the opinion ignore such allegations, which for the purposes of this issue need not be proven by defendant, and finally concludes, contrary to the evidence as well as such allegations, that Rosenbloom was not engaged in interstate commerce, after admitting that all the train he was checking was interstate commerce except a well outfit which was not in a numbered car.

(*b*) That part of said opinion designated as "10" of the conclusions of fact relative to Rosenbloom being or not engaged in interstate commerce, is erroneous, in that it is therein erroneously recited that it is not shown what Rosenbloom had been doing immediately preceding his being killed, while it was alleged by plaintiffs, as is recited under "*a*" preceding that he was up to the very time engaged in taking the numbers of the cars in the outgoing train on track 4, and the evidence shows such to have been his duty and the only duty or occasion for his being there at that time, leaving the only rational inference from the proven facts that he was doing as plaintiff alleged.

(*c*) That part of said opinion designated as "II" of the conclusions of fact bearing on such issue, is erroneous, for that it recites that the crew handling the engine were not engaged in interstate commerce, when the evidence preponderates 85 to 15 that they were, and the most that could be said is that it was not shown where the

car of coal came from or to where it was going further than onto another track and into another string of cars. The Court
251 would, we take it, take judicial cognizance that the car of coal came from without the State.

(*d*) That part of said opinion designated as "12" of the conclusions of fact bearing on such issue, is erroneous in that it recites, that as the switch engine and ballast car were about to pass Rosenbloom, "from some cause and by some means, which are in dispute, he got in front of the ballast car, and was knocked down, run over and killed," while the facts show that Rosenbloom, from some motive unknown to anyone, stepped onto the track immediately in front of the moving ballast car, and was, in consequence of such stepping in front of the car knocked down, run over and killed.

(*e*) That part of said opinion immediately following "13" of said opinion, which states that the writer thereof is inclined to the opinion that appellant is not in a position, under the conditions of its pleadings, to urge the question sought to be raised under assignments "II" and "III," for the reason that the portion of its pleadings challenging the right of appellees to prosecute the suit in the capacity they do, is not under oath, is erroneous; because, first, it is not necessary that it should have been verified; and second, if necessary, the question should have been raised by special demurrer, and it not having been so raised it will be regarded as sufficiently pleaded.

(*f*) The next succeeding paragraph of said opinion which says "as appellee's pleadings allege no fact tending to show that
252 M. A. Rosenbloom was, at any time, engaged in interstate commerce and the facts above stated contain everything that can fairly be drawn from the records which could, in any way, be construed as even tending to show that he was so engaged at the time he received the injuries resulting in his death. We think the evidence wholly fails to raise the issue sought to be submitted in special charges Nos. 1 and 13, the refusal to give which is complained of under assignments "II" and "III" respectively, is erroneous, because of the facts and matters of record referred to hereinbefore in divisions (*a*), (*b*), (*c*), (*d*), and (*e*) of this, the fourth ground for said motion for rehearing, and further, especially because it is not necessary that defendant should have made such allegations, and if it were necessary that he should have made such allegation, the allegations will be found charged explicitly on page 11 of the transcript in defendant's original answer, and also on page 14 in defendant's special plea wherein it is alleged that "the freight train with which and around which the deceased, M. A. Rosenbloom, was at work at and immediately prior to the time of his death was a train loaded principally with freight being transported interstate and being used in such interstate commerce, and the acts and duties of the said M. A. Rosenbloom in connection therewith were acts of interstate being done and performed by him as an employee of this defendant, and his acts were such as were necessary to a proper handling and transportation of said freight in said train." The charges immediately following such quotation on page 14 of the transcript and through said

answer make specific allegation that the defendant was en-
253 gaged in interstate commerce and that M. A. Rosenbloom was its employee and as such was engaged in interstate commerce. The law is that where plaintiff sues and relies upon this action under the State statute and the evidence shows that his right of action, if any, arose under the Federal Statute, there is a variance between his allegations and his proof so that it is not necessary that the defendant should have made any allegation at all as to the interstate character of Rosenbloom's work, and this court is in error in so holding.

(*g*) The next succeeding paragraph of said opinion, which recites in substance, that under certain conditions therein stated, the court would incline to the opinion that a question had been raised as to whether Rosenbloom and defendant were engaged in interstate commerce, but the evidence, as a whole, as the court views it, fails to raise such issue, under authority of Zikos v. O. R. & Nav. Co., 179 Fed. R., 893, because it does not appear that those operating the engine and ballast car were also engaged in interstate commerce, are erroneous. Such holdings and rulings are erroneous; because; (1) As heretofore shown, as is shown, from the record, in appellant's brief, the evidence shows clearly that defendant, and M. A. Rosenbloom as one of its employees, were engaged in interstate commerce, so that the rights of the heirs and personal representatives of Rosenbloom, is fixed and governed by the Federal Statutes; (2) The facts are merely negative as to whether or not the engine switch crew were engaged in interstate commerce, that is, it is not shown from where
254 or to where the car was going; and (3) If defendant and Rosenbloom were engaged in interstate commerce, it is immaterial whether or not the switch crew were at the time so engaged.

(*b*) The Federal Act of April 22, 1908, ch. 149, 35 Stat. L. 65, enacts That every Common Carrier by railroad while engaged in interstate commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives," &-., &-. From a reading of the act, it will be noted, that the carrier is liable (1) "while engaging in interstate commerce, and (2) "to any person suffering injury while he is employed by such carrier in such commerce." The means of the injury nor the person whose act inflicts the injury is neither prescribed nor named. They why, from the statute should or could it be said that although the defendant was engaged in interstate commerce and although Rosenbloom was its employee in such engagement and himself engaged in such commerce for defendant, the injury causing his death is without the provisions of this statute: So holding is to go beyond the statute and read into it a provision not put there by the legislative body and for the court to assume legislative functions.

(*i*) This court, it seems to us, misconstrues and misapplies the case of Zikos v. O. R. & Nav. Co., 179 Fed. Rep. 893. The very next complete sentence, following the one out of which the opinion

takes its quotation says, "This would appear at first blush
255 to run counter to the reasoning which resulted in the overthrow of the first attempt to regulate the matter; but the distinction lies in the definite designation as to when the interstate carrier shall be liable, namely, when engaged in interstate commerce, and to whom it shall be liable, that is, to the employee so engaged, a segregation not made in the original act." Thus it is readily noted that no mention of the person or engagement of the person whose act causes the injury is made, nor does there exist any reason for legislation comprehending this idea. It is quite enough that the carrier to be held liable and the injured employee should at the time of the injury be engaged in interstate commerce. Nor does the next quotation in the opinion of this court, taken from the same case, sustain your Honor's conclusions; it rather supports ours. The later case of Pederson v. D. L. & W. R. R., 184 Fed. Rep., 737, 740, commenting upon the Zikos case, states, that "upon this branch of the case the only question considered was whether the plaintiff himself was engaged in interstate commerce," showing that the conclusion that this court draws from the case was not even an issue there.

(*j*) In the succeeding paragraph, on page 11 of the opinion, it is said, after quoting from Zikos v. Ry. & Nav. Co., it is said: From the above language, it would appear that the proper construction of the Federal statute would be that before a Federal question were raised the evidence must tend to show, not only that the injured party was engaged in interstate commerce but that the servant inflicting the injury, which in law is the principal, was
256 also engaged. We think the reasoning in the majority opinion in the case of Howard v. Illinois Central Railway Company, 207 U. S., 463, sustains the proposition just announced." Such holding is erroneous; because, (1) The language quoted does not justify the conclusion, as hereinbefore shown, and (2) the majority opinion referred to refers to no principle to justify such an inference.

(*k*) All those parts of the court's opinion which discuss assignments "I" and "II" and conclude from the 11th page thereof that "for reasons stated, we hold that the evidence did not raise the question as to whether or not Rosenbloom was, at the time he was killed, engaged in interstate commerce," are erroneous; because, (1) the evidence shows that both the appellant and M. A. Rosenbloom were, at the time of the injury, engaged in interstate commerce, Rosenbloom in the capacity as an employee for appellant. (2) The evidence shows that the engine and switch crew on track 5 were also engaged in interstate commerce, and (3) The law is that if the carrier was engaged in interstate commerce and the injured employee was engaged in interstate commerce, the law enacted by Congress supercedes all other laws and governs the rights and remedies of the injured party and his heirs.

5. This court has erred in overruling assignment "III" presented in appellant's brief, 21 in the record, and the two several proposi-

tions thereunder submitted, as said assignment and propositions are presented on pages 31 to 34 of appellant's brief.

It was error to overrule said assignment and propositions;
257 because,

(*a*) Special charge No. 13 requested by defendant properly embodied and presented the law of the case which was not otherwise given in charge by the trial court, and the trial court erred in refusing such charge; and,

(*b*) No right of action survives to the heirs of M. A. Rosenbloom as such, but only to the personal representatives of M. A. Rosenbloom for the use and benefit of the heirs named in the Federal Statute.

6. The Court erred in all that part of its opinion discussing said assignment "III" and the propositions thereunder submitted, as is specified and pointed out hereinbefore with reference to the discussion by the court of assignment "II" and the propositions thereunder submitted.

7. This court erred in overruling appellant's assignment "IV" in its brief, 22 in the record, and the four several propositions thereunder presented, as said assignment and propositions are presented on pages 34 to 41 in appellant's brief.

It was error to overrule said assignment; because,

(*a*) The trial court erred in refusing defendant's motion for new trial, because the verdict and judgment are contrary to and unsupported by the law and the evidence, in that the evidence entirely fails to show any actionable negligence upon the part of the defendant, its servants and employees in the manner and form as stated in plaintiff's original petition and as is specified in clause
No. 29 of appellant's motion for rehearing in the trial
258 court.

(*b*) The trial court erred in refusing defendant's motion for new trial; because the verdict and judgment are contrary to and unsupported by the law and the evidence, in that there is absolutely no testimony whatever to show that M. A. Rosenbloom became and was in a perilous position from which he could not and would not extricate himself, and that the engineer, or other employees in charge of switch engine and ballast car in question saw or discovered Rosenbloom in such perilous position and after so seeing or discovering him in such perilous position failed to exercise due care to avoid injuring him, as is specified in clause 29 of appellant's motion for new trial in the trial court.

8. This court has erred in all that part of its opinion which discusses said assignment "IV" and its proposition thereunder presented and concludes by overruling the same; because,

(*a*) The evidence in the record discloses clearly that there is an entire failure to show any actionable negligence upon the part of the defendant, its agents, servants and employees in the manner and form as stated in plaintiff's petition.

(*b*) The evidence shows conclusively that deceased's own negligence, and that his negligence, without any concurrent negligence

upon the part of the defendant, its agents or employees, was the sole producing cause of his death.

(*c*) There is absolutely no testimony whatever to show
259 that Rosenbloom was or became in a perilous position from which he could not or would not extricate himself, and that the engineer, or other employees of the defendant in charge of the switch engine and ballast car saw or discovered Rosenbloom in such perilous position, and, after so seeing or discovering him in such perilous position, failed to exercise due care to avoid injuring him.

(*d*) The evidence shows clearly that Rosenbloom walked upon the track immediately in front of the ballast car and the defendant's employees, especially the engineer, could not possibly, after discovering Rosenbloom on the track, or going on the track in front of the car, avoid striking him with the ballast car in question.

(*e*) Because the evidence shows that Rosenbloom's act of negligence, in turning and going upon and attempting to cross the track in front of the ballast car, was concurrent with the motion of the train and so close to the train that it was impossible for the engineer to have avoided striking him after seeing him start across the track and placing himself in a place of danger.

9. This court erred in overruling assignment "VI" in appellant's brief, 13 in the record, and the propositions thereunder submitted.

It was error to overrule such assignment; because, paragraph or division "IV" of the trial court's charge to the jury was erroneous, in that it assumed that a failure upon the part of defendant's employees to exercise ordinary care to avoid running over Rosenbloom
260 was negligence and the cause of his death, and does not require the jury to find from a preponderance of the evidence that defendant's employees were negligent and caused the death of Rosenbloom as a condition precedent to returning a verdict for the plaintiff.

10. The court erred in all that part of his opinion discussing said assignment "VI" and in holding that that part of the court's charge complained of under the assignment, properly submitted to the jury the law of the case and concluded with overruling of the assignment; because such charge does not correctly present the law of the case, and was prejudicial error.

11. This court has erred in overruling assignment "VI" presented in appellant's brief, 18 in the record, and the three several propositions thereunder presented.

It was error to overrule such assignment; because,

(*a*) The trial court erred in refusing to give in charge to the jury, special charge No. 9 requested by the defendant and in lieu thereof gave special charge prepared and given by the court, because the requested charge properly stated the issue as to liability arising from the pleading and the evidence and directed the jury's attention directly to the issue as made, and, neither the general charge nor the special charge of the court so states and submits such issue, but submits an issue in a general form and in a confusing manner and does not properly state the law of the case.

(*b*) Such special charge prepared and given by the court in

lieu of special charge No. 9 requested by defendant, is erroneous; because it fails properly to state to the jury any issue or principle of law applicable to this case, but is confusing and unin-
261 telligible.

(*c*) Such special charge so prepared and given by the court in lieu of special charge No. 9 requested by defendant, is erroneous; because it is not the proper presentation of the law of this case, and the evidence fails to raise the issue of discovered peril as sought therein to be presented.

12. This court has erred in all that part of the opinion filed herein, wherein said assignment "VI" is discussed and overruled, for reasons as follows:

(*a*) Said opinion misconstrues and misapplies the special charge requested by defendant and refused by the court.

(*b*) The law of discovered peril requires that before a duty arises to avoid injuring one in a perilous position, it is necessary for the employee discovering the one in a perilous position to have in fact discovered the party's position and that such position was perilous, and further, the circumstances must be such as that the employee so discovering is not authorized to rely upon the presumption that the party in a perilous position will exercise his own senses and own natural instincts to save himself. The special charge requested by defendant so presented the law and the general charge and special charge presented and given by the court do not so present the law.

(*c*) Under the law, the mere fact that employees in charge of a railroad train seeing a man ahead of a train on the track at a place where there is no public crossing does not impose on them the duty of attempting to stop the train. There must be some further
262 indication that the man is in peril. Though it is the duty of an engineer in charge of a railroad train to keep a lookout for persons on the track and though the Company is chargeable with knowledge of what it is his duty to see, yet it is only when there is some reason for him to apprehend that a person so on the track will not leave it in time to avoid danger that the duty arises to stop the train. Therefore, that part of the opinion of the court on pages 21 and 22 discussing the merits of the charges given and refused, is erroneous. Such parts of the opinion of the court are erroneous, and this court is in error in overruling such assignment and propositions; because the undisputed evidence shows that Rosenbloom stepped on the track immediately in front of the ballast car, having taken only two steps as if to cross the track when he was struck and the bare fact that he was struck before he could cross the track shows that the car was too close for the engineer to have prevented striking him.

13. This court has erred in overruling assignment "VII" in appellant's brief, 20 in the record, and the propositions thereunder submitted; because the trial court erred in refusing to give in charge to the jury special charge No. 12, requested by defendant, which was to the effect that the duty of the defendant's engineer and employees in charge of the switch engine and ballast car to exercise care to avoid striking Rosenbloom in a position of discovered peril would

not arise until Rosenbloom was in fact in a perilous position and until he was known by such employees to have been in such
263 perilous position, and that he could not or would not be able to extricate himself from such perilous position, and that unless they discovered him in a perilous position and failed to exercise such care thereafter, the defendant would not be liable. Such special charge correctly presented the law which was nowhere presented by the court's general charge.

14. This court has erred in that part of the opinion discussing such assignment and propositions; because the law is as stated hereinabove and in said special charge, while the Company was chargeable as though it had seen what the engineer ought to have seen, the evidence in this case is clear that Rosenbloom was in no danger until the moment he started to cross the track immediately in front of the ballast car, and the physical facts, regardless of expert opinions, and other opinions, show that the defendant's engineer was not negligent after seeing Rosenbloom start across the track. The witnesses say that Rosenbloom had barely started across, moving rapidly, and had taken only about two long steps at the time he was struck. If he was moving rapidly and had taken only two steps in going across the track, he could not have gotten out of the way of the car if it had been far enough from him for the engineer possibly to have stopped it before it struck him. It matters not how far the engine ran after it struck him, because it is the striking and running over him that caused the injury. The evidence further shows, as is set out in appellant's original brief and its supplemental
264 brief filed herein, that the defendant was not negligent at all, and that there is no element of discovered peril in this cause.

Wherefore, the appellant prays that notice of this motion be served on Cooper & Stanford, or Mrs. M. A. Rosenbloom, all of whom reside in Potter County, Texas, and that upon a hearing hereof a rehearing be granted herein, and that on said rehearing judgment be rendered reversing the judgment of the trial court and here rendering judgment for appellant.

MADDEN, TRULOVE & KIMBROUGH AND
F. M. RYBURN, *Attorneys for Defendant.*

(Endorsed:) No. 9. The P. & N. T. Ry. Co. vs. Mrs. M. A. Rosenbloom. Motion for Rehearing. Filed in Court of Civil Appeals for Seventh Supreme Judicial District of Texas, Nov. 11, 1911. J. M. Oakes, Clerk. Filed in Supreme Court Dec. 28, 1911, F. T. Connerly, Clerk.

265 *Order Overruling Motion for Rehearing.*

November 24, 1911.

No. 9.

PECOS & NORTHERN TEXAS RY. CO.
vs.
Mrs. M. A. ROSENBLOOM et al.

From District Court of Potter County, November 24, 1911.

This day came on to be heard the motion by appellant for a rehearing of this cause and the same having been duly considered by the Court is hereby overruled.

266 PROCEEDINGS IN THE SUPREME COURT.

Application for Writ of Error.

New Questions.

1. Is a railway company, in a suit by the survivors of an employee to recover damages on account of his death while serving the company, deprived of the right, given by the Act of April 13, 1909, Ls. 1909, p. 279, to plead contributory negligence in mitigation of the alleged damages, by the charge of the trial court limiting the right of recovery to the issue of discovered peril? Or is the right to rely on such plea general, then within the terms of the statute, and available whatever the particular act or issue of negligence relied on?

2. Where the defendant Railway Company and the deceased employee, as such, were both engaged in interstate commerce at the time of the accident resulting in death, and where the act of another employee is alleged to have caused the death and it is not shown whether such other employee was or was not engaged in interstate commerce at the time, will the rights and remedies of the surviving wife and children be determined by the Federal or by the State Statute?

267 In the Supreme Court of the State of Texas.

No. —.

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

Mrs. M. A. ROSENBLOOM, Defendant in Error.

Application for Writ of Error.

To the Honorable Supreme Court of the State of Texas:

The Pecos & Northern Texas Railway Company respectfully shows to this Honorable Court, as follows, to-wit:

I.

On December 27, 1909, defendants in error filed suit in the District Court of Potter County, Texas against plaintiff in error, to recover alleged damages amounting to $30,000.00. By a Third Amended Petition, filed June 8, 1910, Mrs. Rosenbloom sought to recover such damages for herself as the surviving wife, for Milton and Matilda Rosenbloom as the surviving minor children, and for Isaac and Minnie Rosenbloom as the surviving father and mother of M. A. Rosenbloom, deceased, alleging that deceased was killed while an employee of your petitioner, as the direct result of its negligence. (Tr. beginning at top on page 2 and reading to
268 bottom of page 9.) The negligence alleged, among other things, consisted of an allegation as follows: "Plaintiff says further that long before said engine and ballast car came along by the side of said freight train and to the point where her said husband was, that the defendant company, th-ough its said employees in charge of said switch engine and ballast car, saw her said husband and knew and realized that her said husband was placed in a dangerous and perilous situation, and that when said switch engine and ballast car were within 20 or 25 feet of plaintiff's said husband, he, as above stated, attempted to cross said track No. 5, and was thus placed in great danger of being run over and killed, and that defendant, through its employees in charge of said switch engine, saw her said husband when he started to cross said track No. 5, and knew and realized that he was placed in great danger and in a dangerous and perilous situation and was likely to be run over and killed, and thus being apprized of the perilous situation of plaintiff's said husband, it was the duty of the defendant, through its said employees in charge of said switch engine and ballast car, to use every means at their command consistent with the safety of their said engine and ballast car, to avoid running down and killing her said husband; that the defendant, through its said train crew in charge of said switch engine and ballast car, after discovering the dangerous situation of her said husband, could have stopped said switch engine

and ballast car and thereby avoided running down and killing her said husband, or they could have slowed the speed of said engine and ballast car so as to avoid injuring and killing her said husband, or that they could by properly warning her said husband and notifying him in time, avoided running down and killing her said husband; yet, plaintiff says that notwithstanding the defendant, through it employees in charge of said switch engine and ballast car, knew of the perilous and dangerous position in which her said husband was placed, notwithstanding it was their duty to exercise every means at their command to avoid running down and killing her said husband, yet plaintiff says that the defendant's employees in charge of said switch engine and ballast car negligently failed and refused to exercise all the means at their command to stop said switch engine, to slacken the speed of the same or to properly warn her said husband of the approach of same, or to, in any other way, exercise any proper means for the purpose of avoiding and running down and killing of her said husband, and that the negligence of the defendant company, through its said train crew, in charge of the engine and ballast car, as above set out, was the approximate cause of her said husband being run down and killed." (Tr. beginning at top line, page 7 and reading to end of middle line, page 8).

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Defendant answered: First, by a plea in abatement, alleging that it and its employees (including M. A. Rosenbloom) were, at the time of the death of Rosenbloom, engaged in interstate commerce, and denying the right of Mrs. Rosenbloom, in the absence of administration, to maintain the suit in her capacity as surviving widow; Second, by general demurrer; Third, by special demurrer; Fourth, by general denial; and, Fifth, by special pleas. (Tr. beginning at the top on page 10 and ending with the bottom line on page 16.) Such special answer set up: (1) That defendant and its employees, including M. A. Rosenbloom, were, at the time, engaged in interstate commerce, alleging that the Federal Courts, therefore, had exclusive jurisdiction and plaintiff had no right to sue in the capacity in which she sues. (2) That M. A. Rosenbloom was negligent and that his own greater contributory negligence caused his death; and, (3) That the dangers of the situation were open, apparent and assumed by Rosenbloom who voluntarily undertook the work and attempted voluntarily to cross the track in front of the moving cars, when he was killed as a result of his own negligent acts and assumption of great risks and dangers and without any negligence on the part of defendant. (Tr. page 13, beginning with the fifth line from the top and ending with the bottom line on page 16.)

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The court having overruled all preliminary pleas and demurrers, trial was had, before a jury, which resulted in a verdict and judgment rendered on the 15th day of September, 1910, in favor of plaintiff, for the sum of $7,000.00, being apportioned $2,000.00 each to the wife and two minor children, and $500.00 each to the father and mother of deceased. (Tr. beginning with top line on page 87 and ending at the middle of the page on page 89).

In due time motion for new trial was filed (Tr. page 89 near bottom to page 94 near bottom), setting up and raising all questions of law hereinafter presented, which motion was by the trial court overruled (Tr. page 95, entire page), after which appeal was duly perfected and this cause presented in the Court of Civil Ap-
271 peals, Seventh Supreme Judicial District, at Amarillo. Such Court of Appeals, after submission therein, on the 28th day of October, 1911, entered its judgment and filed its opinion affirming the judgment of the trial court. Thereafter your petitioner, on the — day of November, 1911 and within fifteen days after such judgment of affirmance, filed its motion in the said Court of Appeals, asking for a re-hearing therein, and in said motion, assigned all points of law hereinafter presented as grounds, or reasons why such rehearing should have been granted. Such motion for rehearing was, by said court, overruled on the 24th day of November, 1911, and your petitioner now here brings its cause before this Honorable Court, assigning herein errors committed by the trial court and the Court of Civil Appeals as is hereinafter specified.

II.

Your petitioner assigns and shows errors to have been committed in the trial and disposition of said cause, in the Court of Civil Appeals and the trial court, as follows, to-wit:

First Assignment.

The Court of Civil Appeals erred in overruling the first assignment presented in Appellant's Brief (on pp. 22-25), the 19th in the record (Tr. 103-104), and the proposition thereunder presented, which assignment and proposition complained of the action of the trial court in refusing to give in charge to the jury the law of contributory negligence.

It was error to overrule such assignment, for reasons given in the following propositions:

272 1. The issue of contributory negligence was raised by the pleadings and the testimony.

2. Such issue was not submitted to the jury in the court's charge.

3. Special charge No. 10, requested by defendant and refused by the trial court, correctly presented the law upon this issue, as arising upon the pleadings and the testimony.

Statement.

The first assignment presented in Appellant's brief, on pages 22-25, the 19th in the record, on pages 103-104, is as follows:

"The trial court erred in refusing to give in charge to the jury special charge No. 10, requested by Defendant, which is as follows: 'If the jury find from the evidence that Defendant's engineer and switch crew in charge of the switch engine and ballast car that ran over and killed M. A. Rosenbloom, or any one or more of them, were negligent, as is alleged by Plaintiff, and that such negligence

was a producing cause of the death of M. A. Rosenbloom and if you also find that M. A. Rosenbloom was himself guilty of negligence, and that this negligence, concurring with that of such employee or employees of Defendant, was the producing cause of his death, and if because of such negligence, (if any) on the part of Defendant's employee or employer, you determine to find for Plaintiff, then it will be your duty to diminish the damages you find in proportion to the amount of the negligence attributable to M. A. Rosenbloom!"

273 The proposition submitted under this assignment in appellant's brief, on page 23 at the top, is as follows:

"The trial court erred in refusing to give in charge to the jury special charge No. 10, requested by Defendant, for that the issue of contributory negligence was raised by the pleadings and the testimony was not submitted to the jury in the court's charge, and such special charge correctly presented the law as to contributory negligence."

Defendant's second special plea in bar alleges: "That the deceased, M. A. Rosenbloom, was himself negligent and that his negligence and carelessness was the proximate and producing cause of his injuries and that he was grossly negligent and careless, and that had he used reasonable care for his own safety, said accident would not have happened, and his negligence, as compared with that of defendant (if any upon the part of defendant) was so much greater as that the defendant is not liable for any, or if any, a very small proportion of the damages resulting from the death of said M. A. Rosenbloom." (Tr. p. 15, beginning with 11th line from top and reading 10 lines.)

The testimony shows, that deceased, an employee whose duties caused him to be in the yards where switching was being done, and who was acquainted with the surroundings, attempted to cross a track diagonally, in front of a moving car, when, as he had taken about two long steps in his efforts to cross, he was struck by

274 the car and killed. (S. F. p. 1 at beginning to middle line on p. 20.) It is in effect, conceded that Rosenbloom was negligent in attempting to cross the track and getting in a place of danger, but contended that "The only ground of recovery submitted by the court being that of discovered peril, contributory negligence had no place in the case." (Appellee's first counter proposition near bottom on p. 1 of her brief.)

The court in his charge submitted the issue of "discovered peril" as a basis of liability, ignoring other acts of negligence alleged in Plaintiff's petition. (Tr., beginning at top on p. 70 and reading to end of 7th line from top on p. 72.) He then refused special charge No. 10, embodying the law of contributory negligence, as copied in the assignment hereinabove quoted, (Tr. p. 84, entire page).

The action of the trial court refusing to give special charge No. 10 requested by defendant was complained of as error in defendant's motion for new trial in said court, being the 26th ground in said motion. (Tr. p. 93, XXVI.)

The action of the Court of Appeals overruling the assignment and propositions complaining of the action of the trial court in refusing

such charge was assigned as error in Appellant's motion for rehearing in said court, being assignments 1 and 2 in such motion.

Authorities.

Gen. Laws, 1909, p. 280, Sec. 2.
Employers' Liability Act, 1908, Thornton, p. 243.

275 Second Assignment.

The Court of Civil Appeals erred in all those parts of the opinion rendered by said court herein which discuss and pass upon said first assignment presented in appellant's brief, 19th in the record, and the propositions thereunder submitted. Such parts of said opinion are erroneous in respects and for reasons, as follows:

(*a*) That part thereof which holds that Section 2 of the Act of 1909, found on page 280 of the Session Acts, is susceptible of more than one construction, is erroneous; because said act is plain, unambiguous, and can have but one meaning, which is plain and apparent. Such meaning, expressed in other terms, is that the Legislature, in giving to employees of railroads and their heirs, a right of action for damages resulting from personal injuries, which they did not have at common law, intended that such action should exist regardless of the fact that the employee injured may have been negligent, and further intended, that if the injured employee and other employees of the company should be guilty of negligence concurring to produce the injuries, the amount of recovery to which the injured party or his heirs should be entitled, should be lessened as his negligence, compared with that of the other employees, increased.

(*b*) Those parts of said opinion, which purport to state the law of "assumed risk" and "contributory negligence" as the rules applicable thereto existed prior to the Act of 1909, are erroneous, for that such opinion does not correctly state such rules and then makes a misapplication thereof to the facts of this case.

276 (*c*) Those parts of said opinion which discuss and seek to apply the "doctrine of discovered peril", are erroneous, because such opinion does not properly state such rule and makes a misapplication thereof to this case.

(*d*) Those parts of such opinion which seek to apply the rule of "assumed risk" to the facts of this case as a reason why special charge No. 10 is supposed to have been correctly refused, and the reference to the opinion of Justice Brown in H. & T. C. Ry. Co. vs. Alexander, 119 S. W., 1135, are erroneous, in that such rules are foreign to the question at issue and have no application thereto, neither as a precedent nor by rational analogy.

Statement.

For statement and authorities we refer to the statement and authorities made under the preceding assignment.

Argument.

Appellee's counsel, as well as the Honorable Court of Civil Appeals, seem to concede that Rosenbloom was shown to have been guilty of negligence causing, or contributing to his own death. They contend, that, notwithstanding Rosenbloom's own negligence, the trial court correctly refused the special charge seeking to have the jury consider such negligence, in comparison with that (if any) of defendant's other employees, as a basis for estimating the amount of damages to be awarded; because, the charge of the court submitted only the issue of "discovered peril", eliminating all other acts of negligence alleged by plaintiff as a basis of liability. So far as we have yet been
277 able to discover, this question has not heretofore been before the courts of Texas, at least in the form here presented.

If a man carelessly and negligently gets on a railroad track and goes to sleep, when he knows a train is liable to come along before he awakes and gets out of its way, he is, of course, guilty of negligence. His negligence necessarily precedes any negligent act of the trainmen who may subsequently come along. If, while he is on the track, as the result of his negligence, a train comes along and the engineer sees him there in a dangerous position, realizing that he is asleep, so that unless the train is stopped he will be killed, the engineer must use reasonable care, under the existing conditions, to avoid running over and killing him. The engineer has had the "last clear chance" to save a human life and the dictates of "humanity" demand that he exercise "reasonable care" to save the life of even a worthless human being,—the "humane doctrine." Where such party is up and going, not asleep or in some other state of inaction known to the engineer, the movements of the train and the party in danger are concurrent in time, and the engineer has a right to presume that such party will exercise his senses and direct his movements for his own safety, and to keep his train going until he discovers that the man's position is perilous and such as that he probably cannot or will not save himself. When the engineer discovers such danger, and not till then, his duty arises to exercise due care to avoid the impending injury. The time for the party in danger to exercise care is "past history," so to speak.
278 Although his negligence may have been and was the first cause in the chain of events leading up to the present danger-our condition, it is a past and remote cause. The engineer is called upon to deal with a present condition and the "humane doctrine" requires of him, that he take advantage of "the last clear chance" and avoid the impending injury if he can do so by the exercise of reasonable care; and if he fails, his company will not be excused simply because a prior and remote act of the man in danger may have been the first in a chain of acts and circumstances which have resulted in placing the life or limb of a human being at his disposal and subject to his care.

Such was the rule, generally speaking, prior to the legislative acts cited above. But how or why does this rule, which existed prior to the statute, create an exception to the legislative act? The act is general in its terms and recognizes no exceptions. The charge re-

quested by appellant and refused by the Court presented the law as written; and had it been given, would have left the jury to estimate the remoteness or proximity of causes as well as the comparative degree of negligence chargeable to the different employees? If the rule as it existed prior to the act is inconsistent with the legislative intent, as evidenced by the very clear and explicit terms of the act, the rule is simply abrogated by the act.

Clearly the purpose of the law, as shown by its own wording, was, in all cases where railroad employees are injured as the result of negligence of other employees, to make the company liable
279 and to regulate the amount of recovery, making it in proportion to the relative, or comparative negligence of the injured and injuring employees.

Such being the purpose of the law enacted, there is no escape from the conclusion that it was error to refuse the charge requested.

At common law no right of recovery exists in favor of the legal representatives of a deceased person on account of personal injuries causing his death. This rule necessarily resulted from the rule that personal actions dies with the person. But the Texas Legislature, apparently considering that all rights a man would have had to recover for injuries, had not the injuries resulted in death, should exist in favor of those who would have derived a pecuniary be-efit from his living, where the injuries resulted in death, passed a statute giving such right of action. Such acts took on the form given in Title 57 of our Revised Statutes, Arts. 3017-3027, which was the law generally, until 1909. Without, in any manner, altering these statutes as applicable to "Injuries Resulting in Death" generally, and which in no sense attempt to change the general rule of "contributory negligence," the 31st legislature, by an act which became a law April 13th, 1909 (L. 1909, pp. 279-280) passed an act made applicable to corporations and persons operating railroad and legislating upon acts of "contributory negligence" as affecting the liability of railroads when the negligence of their servants cause injuries to other servants. This act, as we read it, puts railroad companies in a class to themselves and was designed to be the law of liability as to them,
280 distinct from the general personal injury statute as well as from the common law. In short it is the law of liability of railway companies to its employees and their lives, and this liability is statutory and in derogation of the common law.

Sections 1 and 2 of this law enacts:

1. "That every corporation * * * operating a railroad in this state shall be liable in damages to any person suffering injury while he is employed by such carrier operating such railroad; or in case of death of such employee, to his or her personal representatives for the benefit of the surviving widow and the children, or husband and children, and if none, then of the next kin dependent upon such employees, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, etc. etc."

2. "That in all actions wherever brought against any such common carrier or railroad under or by virtue of any of the provisions of

this act to recover damages for personal injuries to employees, or where such injuries have resulted in death, the fact that the employees may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of such negligence attributable to such employee, etc."

Subsequent sections refer to the Federal Employers' Liability Act and declares the intent of the Legislature to make the State law conform to the Federal law. The Federal Employers' Liability
281 Act, which is found in Appendix "A" to Thornton's Employers' Liability Act, page 243, has sections corresponding to that of the Act of the Legislature above quoted from. The principal difference in the two acts is as to who is authorized to sue. Section 3 of the Federal Act provides that: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

In these two laws we find no exceptions in favor of Mr. Rosenbloom, a yard employee, an office employee, or any other employee; but the laws apply to "in all actions" brought against common carriers or railroads.

It is a familiar rule that statutes creating a right of action not given in the commou law are to be strictly construed. Likewise penal statutes are to be strictly construed. A party seeking to maintain an action under either such statutes must bring himself clearly within the provisions of the law. He relies upon a statutory law. He must accept the law as it is written. If it gives him the right of action he may maintain it, but he must take it with all the limitations and restrictions placed upon the right. These statutes create the right to maintain a suit for injuries resulting in the death of a relative and provide that the negligence of that relative shall not bar the recovery but they connect therewith the condition or provision that the negligence of such deceased party shall be taken into consideration in mitigation or to lessen the amount of the recovery, leaving the jury to compare the relative negligence of the deceased employee and those whose negligence caused his death. There
282 is no exception from this provision, as above stated, that would take out any class of persons or any class of cases. Why then, can the trial court by limiting the jury to a consideration of the negligence alleged upon the issue of "discovered peril" so modify the statuate?

Prior to the recent legislative enactment upon the subject of assumed risk an employee who accepted employment from a railroad company assumed all risks of danger reasonably incident to the line of work in which he engaged. The company was, and is yet, bound to exercise reasonable care to provide him a reasonably safe place to work and reasonably safe tools with which to work. If the company failed in either and a danger thereby arose, if it was open and apparent or known to the employee so that he could or should have avoided injuring himself, if the company's want of due care had caused the dangerous place or tool, and he knowingly went ahead and

encountered the danger when he might have avoided it, be "assumed the risk" of the danger and could not recover if injured. The recent statute upon the subject of assumed risk has changed this rule under certain conditions and its application to certain classes of persons. But how or why does that statute have any bearing upon the issue here presented? It seems that the Court of Civil Appeals has made a gross misapplication of the statute to the case at bar.

Reading the entire Act as well as the general statute above referred to, we find no provision, or no wording making the limitations or applications as contended for by Appellee's counsel. On
283 the other hand, we find the authorities saying: "In cases where it has been determined or conceded that the given statute is one which inures to the benefit of servants of the class to which the injured person belongs, a second question will sometimes present itself for settlement, viz., whether in view of the terminology of its provisions, and the circumstances under which the injury was received, the master can avail himself of the defense of common employment. The general principle deducible from the authorities cited below would seem to be this,—that an intention on the part of the Legislature to preclude him from relying upon that plea, will not be inferred unless such intention is explicitly declared," 2 Labatt, Master & Servant, page 1878, Section 638, and authorities cited thereunder, beginning at note at the bottom on page 1879.

It is apparent from the reading of the law that no intention can be inferred to the effect that a defendant could not avail himself of the pleas of contributory negligence as a means of lessening the amount of recovery in such action. In other words, the language of the statute where it says "in all actions," indicates clearly to the contrary.

Third Assignment.

The Court of Civil Appeals erred in overruling the Second Assignment presented in Appellant's Brief (on pages 25-30), the fifteenth in the record (Tr. 102), and each of the several propositions thereunder submitted, which assignment and propositions complained of the action of the trial court in refusing to hold as a proposition of law, that plaintiffs were not entitled to sue in their capacity as survivors of M. A. Rosenbloom, deceased, and in refusing to
284 charge the jury accordingly for defendant.

It was error to overrule such assignment for reasons given in the following propositions:

1. M. A. Rosenbloom, at the time of his death, was an employee of defendant, a railway company engaged in interstate commerce, and was, himself, as such employee so engaged.

2. Rosenbloom being so engaged, plaintiffs' cause of action, if any they have, arose under the Federal Employers' Liability Act, to the exclusion of the State Law.

3. Plaintiffs' cause of action (if any) having arisen under the Federal Law, suit could be maintained only by a personal representative of deceased, his administrator or executor, as such, and not by his surviving wife and children, as survivors.

4. Plaintiffs having sued as survivors, and it appearing from the evidence that their right of action, if any, arises under the Federal law authorizing suits by personal representatives of the deceased, there was a material variance between the allegations and the proof.

Statement.

Bearing upon the foregoing assignment and supporting propositions the Court of Civil Appeals find facts numbered from 1 to 13, inclusive, as follows:

"1. Appellant is a railway corporation, owning and operating a line of railroad, extending from Amarillo southwesterly to the New Mexico-Texas state line at Texico, where it connects with the line of the Eastern Railway Company of New Mexico and its line
285 connects at Amarillo with that of the Southern Kansas Railway Company of Texas." (P. 6).

"2. On and prior to the 27th day of November, 1909, defendant company was engaged in transporting freight and passengers for hire, being a common carrier, duly organized and chartered, under the laws of the state of Texas, and engaged in a railway transportation business." (p. 6).

"3. In connection with its connecting lines, known as the 'Santa Fe System' lines and other lines, it was and is engaged in transporting goods and passengers intrastate and interstate, about eighty-five per cent of its traffic for the month of November, 1909, having been interstate and about fifteen per cent thereof intra-state." (Opinion, p. 6.)

"4. In connection with its business as such common carrier, it has and owns and owned and was operating extensive switch yards, storage tracks, shops, etc., on and prior to November 27, 1909, at Amarillo, in Potter County, Texas. There were three of its yards, known as the east, the middle and the west yards, respectively." (Opinion, p. 6.)

"5. M. A. Rosenbloom became an employee of defendant about the first day of November, 1909, at Amarillo, Texas, in the capacity of seal clerk and continued to be so engaged until the time of his death, which was about six o'clock P. M., November 27, 1909." (Opinion, p. 7.)

"6. As such clerk, it was the duty of M. A. Rosenbloom to go in, on and about said yards and there seal all incoming and outgoing trains and take a list of the cars in each such train by car numbers and initials, note the condition of each car, especially as to the door being sealed and seal all unsealed doors, look about icing
286 refrigerator cars, etc., and report cars for icing, etc., and note broken car doors and report losses of freight, etc. Of such matters it was his duty to make a record, which was kept in a book in the yardmaster's office, from which to answer questions and correspondence in the future, making inquiries as to the condition of cars and freight passing, through the Amarillo yards." (Opinion, p. 7.)

"7. The yards aforesaid were in constant use day and night dur-

ing the time Rosenbloom was so engaged with switch engines, with their cars, and incoming and outgoing trains, coming and going constantly." (Opinion, p. 7.)

"8. In said middle yard, where Rosenbloom was killed, there were seven switches or yard tracks, all lying east of appellant's main line track, extending practically north and south, parallel and numbered from one to seven inclusive, and consecutively, from west to east." (Opinion, p. 8.)

"9. At the time of the death of Rosenbloom there was a long freight train, about thirty-four cars, leaving from track No. 4 in these middle yards to go out at the north end of the line and thence on to Waynoka, Oklahoma, interstate over the line of the Southern Kansas Railway Company. Such train was made up of cars which has come in from New Mexico over appellant's line and was going out over the Southern Kansas to points in Oklahoma, Missouri, well drilling tools, consigned to Panhandle, a point in Carson County, Texas, which would be reached without leaving the state, and which car of tools had originated at Amarillo, Texas, to be used in work on the company's water station at Panhandle." (Opinion, p. 8.)

287 "10. While such train was moving out slowly from said track, Rosenbloom was going down between tracks 4 and 5 by the side of said outgoing train from south to north, for what purpose is not shown by the testimony, nor is it shown what he had immediately preceding his being killed been doing." (Opinion, p. 8.)

"11. As such outgoing train and Rosenbloom were so moving, one of the day switch cars having coupled an engine on to the south end of a ballast car, somewhere to the south of where Rosenbloom was, came north (the same direction as the outgoing train and Rosenbloom were moving) on track 5, intending to go a few car lengths beyond where they struck Rosenbloom and there couple on to some coal cars and pull them back south on track 5. The crew handling this switch engine and ballast car were not engaged in interstate commerce at the time Rosenbloom was killed." (Opinion, p. 8.)

"12. As this switch engine and ballast car were about to pass Rosenbloom from some cause and by some means, which are in dispute, he got in front of the ballast car, was knocked down, run over and killed." (Opinion, p. 8.)

"13. Rosenbloom was the husband of Mrs. M. A. Rosenbloom, plaintiff, the father of Milton and Matilda, and the son of Isaac and Minnie Rosenbloom; was 26 years old at the time of his death and earning sixty dollars per month, and during the time of his employment he had resided with his family at Amarillo, Texas." (Opinion, pp. 8-9.)

The opinion precedes these specifications of facts with the statement "that the record contains no other facts tending to show
288 that M. A. Rosenbloom was at any time engaged in interstate commerce. (Opinion, p. 6, near top.) It also follows such finding with a statement that "Appellee's pleadings allege no fact tending to show that M. A. Rosenbloom was at any time engaged in interstate commerce." (Opinion, p. 9, second paragraph.)

The court will observe that the findings of the court of Civil Appeals finds that the outgoing train on track 4 was bearing interstate commerce almost exclusively and that 85 per cent. of the company's traffic for the month was of the same character. Also that M. A. Rosenbloom's duties were with such trains and traffic in defendant's yards. Plaintiffs' petition alleges, so that defendant did not have to prove in support of its plea, "that while her said husband was engaged in said duty said freight train was moving out on its regular run and was moving out along said switch track No. 4, and that her said husband was between said tracks Nos. 4 and 5 with his face towards the north in the same direction in which said freight train was moving and was walking along by the side of said freight train for the purpose of observing and getting the numbers of the cars in said freight train while the same was pulling out." (Tr., beginning at middle line of 5th line from top to period in 14th line from top.)

This allegation is followed by a further allegation of performance of duty by deceased.

Defendant's answer, notwithstanding the statements in the opinion, alleges, that "At the time of the accident in question, this defendant, with its said connecting carriers, were engaged in interstate commerce, carrying freight and passengers for hire over their
289 respective lines of railroad, interstate, on through billings, and the freight train with which and around which the deceased, M. A. Rosenbloom, was at work at and immediately prior to the time of his death, was a train loaded principally with freight being transported interstate and being used in such interstate commerce; and the acts and duties of the said M. A. Rosenbloom in connection therewith were acts of interstate commerce being done and performed by him as an employee of this defendant; and his acts were such as were necessary to a proper handling and transportation of said freight in said train." (Tr. 14, beginning with the last word in the 5th line from the top and reading to end of paragraph.)

The opinion of the Court of Appeals holds that the switch crew handling the engine and ballast car at the time of the accident, were not engaged in interstate commerce. This appears to us to be a conclusion of law. We venture a short statement of the facts: They were one of the day crews engaged in these yards, making up outgoing trains and doing switching and yard work generally necessary. From the Court's findings, eighty-five per cent of the freights they handled, was interstate, and as much of their work. They were at this particular time going in on track 5 to pull out some coal cars to set them over on another track, but where the coal came from or to what place going, it is not shown.

Remarks.

As a whole, the opinion of the Court of Civil Appeals, it seems to us, admits outright propositions 2, 3 and 4 above, draws a
290 wrong conclusion as to one, half way concedes such to be an error, and then overrules the assignment; because, as they

view the law, the switch crew handling the switch engine and ballast car were not at the time engaged in interstate commerce.

As to whether such crew was so engaged, seems to us to be a question about which people could differ from the facts disclosed. The final effect of the Court of Appeals being thus, we must treat this as a case where the deceased and the defendant were engaged in interstate commerce, and where the engineer of the switch crew, the one presumed here, for this question, to have caused the death, was not so engaged.

The Federal Act of April 22, 1908, Chap. 149, 35 Stat. L. 65, enacts That every common Carrier by railroad while engaging in interstate commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representatives," &c. From a reading of the act, it will be noted, that the carrier is liable (1) "while engaging in interstate commerce, and (2) "to any person suffering injury while he is employed by such carrier in such commerce." The means of the injury nor the person whose act inflicts the injury is neither prescribed nor named. Then why, from the statute should or could it be said that although the defendant was engaged in interstate commerce and although Rosenbloom was its employee in such engagement and himself engaged in such commerce for defendant, the injury causing his death is without the provisions of this statute. So,
291 holding is to go beyond the statute and read into it a provision not put there by the legislative body and for the court to assume legislative functions.

The Court of Appeals, it seems to us, misconstrues and misapplies the case of Zikos v. O. R. & Nav. Co., 179 Fed. Rep., 893. The very next complete sentence, following the one out of which the opinion takes its quotation says, "This would appear at first blush to run counter to the reasoning which resulted in the overthrow of the first attempt to regulate the matter; but the distinction lies in the definite designation as to when the interstate carrier shall be liable, namely, when engaged in interstate commerce and to whom it shall be liable, that is, to the employee so engaged, a segregation not made in the original act." Thus it is readily noted that no mention of the person or engagement of the person whose act causes the injury is made, nor does there exist any reason for legislation comprehending this idea. It is quite enough that the carrier be held liable and the injured employee should at the time of the injury be engaged in interstate commerce. Nor does the next quotation of the court, taken from the same case, sustain the conclusions of the Hon. Court of Civil Appeals; it rather supports ours. The later case of Pederson v. D. L. & W. R. R., 184 Fed. Rep., 737, 740, commenting upon the Zikos case, states, that "upon this branch of the case the only question considered was whether the plaintiff himself was engaged in interstate commerce," showing that the conclusion that his court draws from the case was not even an issue there.

In the succeeding paragraph, on page 11 of the opinion,
292 after quoting from Zikos v. Ry. & Nav. Co., it is said: "From the above language, it would appear that the proper construc-

tion of the Federal Statute would be that before a Federal question were raised the evidence must tend to show, not only that the injured party was engaged in interstate commerce but that the servant inflicting the injury, which in law is the principal, was also engaged. We think the reasoning in the majority opinion in the case of Howard v. Illinois Central Railway Company, 207 U. S., 463, sustains the proposition just announced." Such holding is erroneous; because, (1) The language quoted does not justify the conclusion, as hereinbefore shown, and (2) the majority opinion referred to refers to no principle to justify such an inference.

Since this case was decided in the Court of Appeals, other authorities have come to our knowledge bearing on the issue as to whether this case comes within the Federal Statutes or not, that is as to whether the parties were so engaged in interstate commerce or not, especially the switch crew. One of these has not yet been published, but was given out in the daily press as a news item from Washington to the effect that the Federal Supreme Court had ruled that where a carrier was engaged in interstate commerce, all its agencies so engage-, regardless of the fact that they might also be engaged and used in intrastate traffic, were properly subject to the control of the Federal Statute. To this effect, also, we find the "Liability cases" in the 207 U. S. modified by B. & O. Ry. Co. vs. I. C. C., 221 U. S.,
293 612, decided by Justice Hughes May 29th, last.

Also So. Ry. Co. v. U. S., 222 U. S., 20, is a later case, in which Justice Van De Vanter holds, that the safety appliance act embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce, and is not confined exclusively to vehicles engaged in such commerce; and that the power of Congress, under the commerce clause of the Constitution "is plenary" in such matters.

If we are to regard these cases, it would seem there is but little room left for discussion, and that this Court should reverse the judgment of the trial court and dismiss this plaintiff's suit without prejudice to her right to take out administration and proceed as such.

Fourth Assignment.

The Court of Civil Appeals erred in overruling the Third Assignment presented in Appellant's Brief (on pp. 31-34), the twenty-first in the record (Tr. 104-105), and the two several propositions thereunder submitted, which assignments and propositions complain of the action of the trial court in refusing to give in charge to the jury, at the request of defendant a charge to the effect that if Rosenbloom was engaged in examining seals on cars being transported interstate, and if such work was necessary and a part of the work of transporting freight interstate, &c., then plaintiffs could not recover in the capacity in which they sue.

It was error to overrule this assignment: because,

294 1. Special charge No. 13 requested by defendant properly embodied and presented the law of the case which was not otherwise given in charge to the jury by the trial court, upon a material issue in the case.

2. No right of action survives to the heirs of M. A. Rosenbloom as such, but only to his personal representatives for the use and benefit of his heirs.

Statement.

The assignment referred to copies the charge requested and refused, and is as follows:

"The court erred in refusing to give in charge to the jury special charge No. 13 requested by Defendant, which is as follows: 'If M. A. Rosenbloom, at the time of his death was engaged in examining seals and making record of seals on cars being transported inter-state over the line of Defendant and other lines of connecting carriers, and if such work was a necessary part and a customary work reasonably carried on by Defendants as a part of its business transporting freight inter-state over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict for the defendant on its special plea that plaintiff had no right to maintain this suit in the capacity in which she sues.'"

Remarks.

If our contention under the preceding assignment is correct, to the effect that if the defendant and deceased were engaged in
295 interstate commerce, the Federal law controls, regardless of whether the engineer and switch crew were so engaged or not, then it was gross error to refuse this charge and give the court's charge as given. If, however, the Court of Appeals is correct in holding that it were necessary that the switch crew also must have been engaged in interstate commerce to bring the case within the provision of the Federal Law, then this charge becomes immaterial.

Fifth Assignment.

The Court of Civil Appeals erred in overruling the fourth assignment presented in Appellant's Brief (on pp. 34-41), the twenty-second in the record (Tr., 105-106), and the four several propositions thereunder presented, and as well erred in overruling the fifth proposition submitted under the second assignment presented in said brief, on page 28 thereof, which said assignments and propositions complain of the actions of the trial court in refusing to direct a verdict for defendant and in refusing to grant defendant a new trial, because of the insufficiency of the evidence to show actionable negligence upon the part of defendant, or other liability.

It was error to overrule such assignments and propositions; because,

1. There is no evidence at all, which if true, is sufficient to support a finding of actionable negligence upon the part of defendant or its employees other than deceased Rosenbloom.

2. The evidence shows conclusively that Rosenbloom was negligent and that his negligence, without any concurring negli-
296 gence upon the part of the defendant or its other agents and employees, was the sole producing cause of his death; and

there is absolutely no evidence to support any other conclusion or finding.

3. There is absolutely no testimony whatever to show that M. A. Rosenbloom became and was in a perilous position from which he could not or would not extricate himself, and that the engineer, or other employees of the defendant in charge of the switch engine and ballast car, saw or discovered him in such perilous position, and after so seeing or discovering him, failed to use due care to avoid injuring deceased.

4. The evidence shows clearly that M. A. Rosenbloom walked upon the track immediately in front of the ballast car, and that defendant's employees, members of the switch crew, especially the engineer, could not possibly, after discovering him on the track, or going on the track in front of the car, have avoided striking him; and there is absolutely no evidence that the engineer could have stopped in time to avoid the injury.

Statement.

The defendant requested the trial court to instruct the jury to return a verdict for defendant, which request was refused (Tr., p. 79). This action of the court was assigned as error in the Motion for new trial in said Court (Tr., p. 92, XXII), which was overruled (Tr., 95). The defendant moved for new trial in the trial court, assigning that the verdict and judgment were unsupported by the facts for that: (*a*) The evidence entirely fails to show actionable
297 negligence upon the part of defendant; (*b*) The evidence shows conclusively that deceased was negligent and that his negligence, without any concurring negligence upon the part of defendant's other employees, was the sole producing cause of his death; (*c*) That there was no evidence of a discovered peril followed by negligence causing the death of Rosenbloom; (*d*) The evidence shows clearly that Rosenbloom walked upon the track in front of the moving car and that defendant's other employees could not possibly, after discovering him so doing, have avoided striking him. (Tr., 93-94, XXIX.) This motion was overruled (Tr., 95). Such rulings were assigned as error. (Tr., 102, XV; 105, XXII.) The charge of the trial court submitted only the issue of "discovered peril," ignoring all other negligence charged (Tr., 70-71). Bearing upon such issue, we submit the following: The allegation, as hereinbefore quoted, on page 2, is that Rosenbloom started to cross track 5 and that defendant's engineer saw him do so, seeing his perilous position and failed to exercise care to avoid striking him. We note the following undisputed parts of evidence bearing upon this allegation: Tracks Nos. 4 and 5 are parallel and extended north and south. A freight train was moving out slowly, over 4, to run onto the main line and leave. The switch engine was backing up, so that engineer's side was next to track 4, on track 5, pushing an empty ballast car, also going north. The field switchman, Haney, was on north end of ballast car, in the proper place, and another switchman was on the other end. Rosenbloom was walking north, in the same direction

as the train and car, between tracks 4 and 5. If he had
298 continued to walk, with reasonable care to keep near the centre, he was in no danger and would not have been hurt. Rosenbloom was seen so walking by both the switchman Haney and the engineer Walker. The ballast car and engine were moving 5 or 6 miles per hour.

Haney testified for plaintiff: "I saw Rosenbloom as we approached him. Rosenbloom did not look back during the time to my knowledge. He was walking between the tracks, * * *, and when we got near, about 20 feet distant from him, he started to cross the track rather obliquely, and I believe he took not exceeding two steps until the end of the car on which I was riding struck him." (S. F. p. 6, beginning middle 3rd line from top and read to end of 10th line from top.) * * * "I was working as a field switchman, and as I stated awhile ago * * * The rules of the company required me to be diligent and to ride on the rear and all of the time we were working. We call it the head when we are backing up. Yes, the train was moving forward. I was at the head end and if it was moving backward I was at the back end; but we call it the head end when we are backing up. The rules and requirements of the defendant company required this of me at all times and I did it. I did this to the best of my ability this particular time. I was riding on the end of the car because we were backing up and were to couple on to some other cars. I kep- the best outlook I could." * * * "I cannot answer the question as to what I left undone that could have been reasonably expected of me under the circumstances. In my judgment, I did not leave anything undone
299 that I could do to have prevented the accident. I did the very best I could under the circumstances. It was not in my power to have done anything more." (S. F. beginning with 6th line from the bottom on page 6 and reading to the period on the 12th line, counting from the top on page 7.) * * * "I said if Rosenbloom ever looked back I never saw him. I was continuously looking at him so that I could detect every motion of his head or every motion he made. I never had that in view as my object. I holloed at Rosenbloom when we were about 5 car lengths from him. I do not remember having holloed at him when we were about 50 feet away. My recollection is that it was 4 or 5 car lengths from me to him at the time I holloed at him. I holloed at him one time. I do not think I holloed at him when I was 50 feet from him. If I holloed at him when about 50 feet from him I do not remember it. I stated that I have a signal to the engineer when about 5 car lengths from Rosenbloom. I did not give him a signal within 50 feet. I do not remember giving the signal at that distance. The engineer did not slow down when I gave the signal. At the time I holloed at Rosenbloom he first walked near the moving train on track 4 and that led me to believe he knew we were approaching, then he moved near the center between the two tracks—that is my recollection of the matter,—and then he started across the track and got caught. It was after I holloed at him that he moved near the train passing on track 4. As I stated, I was moving near the

moving train and then when he seemed to be near track 4 I holloed and gave the slow up signal. I do not think he moved near
300 track 4 immediately after I holloed." (S. F. beginning at the period near the end of the 4th line from top on page 13 and reading to the end of the last line on the page). "I do not remember his having moved in either direction to lead me to believe which way he was going. As I have already stated, if the engineer slowed down the train at all I did not detect it. The engineer gave four blasts of his whistle about 15 or 20 feet from the man he hit. I do not think he ever gave it before that time. If he gave it before that I did not hear it." * * * We were not at the time slowing down to couple on to the coal cars. The only way I have of answering this question as to speed is to say that if he decreased the speed any I could not tell it. I have no way of measuring the speed accurately." * * * "Mr. Rosenbloom was a little nearer track 5 than he was track 4 when the whistle sounded. He was at the end of the ties walking obliquely across track 5. It is my positive recollection that the whistle blowing was simultaneous with the time the car struck him. That is my positive recollection. To the best of my knowledge and recollection that is the way it happened." * * * "I am sure—almost sure—that the car struck Rosenbloom at the same moment the whistle sounded. Maybe there was a slight difference of time. He did not travel any distance at all to speak of after the whistle sounded until the train struck him. At the time you mention he was starting across the track, that is the time when the engineer first sounded four blasts, when the last sound came out, right at the last sound, he was struck. There was a very short time elapsed between the last blast of the whistle and the time
301 Rosenbloom was struck with the car. It would be almost impossible for the engineer to make four blasts of his whistle at the same instant. The accident happened in daylight. Rosenbloom was walking along between the tracks, neither fast nor extra slow." (S. F. beginning with the first word in first line on top of page 14 and reading to the first period in the 6th line from top on page 15.) * * * "My statement there to Mr. Miller was the same as I have heretofore made, that it was nearly the same time that he stepped on the track that the train struck him—just a second or two difference. Yes, I made the statement which you read from the written statement signed by me. It was over my signature. (The statement referred to precedes this quotation and is as follows: "Within just a few seconds after the whistle was sounded Rosenbloom, without looking back, stepped on our track just a few feet in front of us, being only one long step obliquely on the track when the drawbar struck him.) I made the following statement to Mr. Miller and it is contained in this writing above my signature, to-wit: 'The way car of the train on track 4 was just passing when we struck Rosenbloom.'". (S. F. p. 17, beginning with the 11th line and reading to the last period in the 19th line, counting from the top.) * * * "At the time he started to cross he could not have been over two steps, maybe one—over the rail and a short step inside the rail until we hit him. The front end of the ballast car was about

20 feet from him at the time he started to cross the track. I do not think the engineer sounded the whistle until we were nearer
302 to Rosenbloom than that. It was after that time that he began to sound his whistle. There were four blasts of the whistle. I never heard it except on that one occasion. I never heard it but one time in connection with the accident or near the time of this accident. Rosenbloom was not to exceed 20 feet from the north end of the ballast car when the first blast of the whistle sounded. He was getting nearer track 5 at the time the first blast of the whistle sounded. I believe he was near enough to track 5 for the corner of the car to have struck him. At the time the first sound of the whistle sounded he had started across track 5 nearer the west rail than he was to the middle line between the tracks and he was moving away from track 4. I believe a man would have sounded four blasts of the whistle in two seconds—I will say three seconds. My best recollection as to the time consumed in sounding four blasts of the whistle, I will say is five seconds. I said awhile ago that there was just a very short period of time elapsed between the last sound of the whistle and time the ballast car struck Rosenbloom. (S. F. p. 22, beginning after the period in 5th line from the bottom and reading to the period in the 6th line from the top on page 23.)

Engineer Walker testified, among other things, as follows:

"I blew the whistle as we were coming down track No. 4 before we reached and ran over Rosenbloom. The bell was ringing before this time. I gave four blasts of the whistle about 7 or 8 car lengths from where we ran over this man. The four blasts the way I blew
303 them is a crossing signal. I blew two long blasts and two short ones. That is a road crossing or curve whistle used to give warning. I saw Rosenbloom prior to the time I sounded the whistle. I saw him when we started in on this track. * * * He was walking along between the tracks numbered 4 and 5, along beside the freight train which was pulling out of town. He was probably 7 or 8 car lengths ahead of me when I blew the whistle." (S. F., beginning with the 10th line from the top and ending with the period in 23rd line from the top.) * * * "I saw Rosenbloom after blowing the whistle, the four blasts. He was walking down the tracks and when I blew the whistle at him he looked around and then walked on down the track, and when we were probably something like 10 or 15 feet from him—I can't tell the exact distance but we were right near him, he started right across our track in front of the ballast car. That is the last time I saw him until his body came back. When he started to cross the track he just moved like he was going diagonally across the track. When he started cross the track I put the air on and put the engine over and pulled her wide open. I mean I pulled the throttle wide open and reversed the engine so as to put it in forward motion which made the engine try to go the other way. I put her in forward motion and gave her speed. If I had not locked the wheels they would have turned the train the other way. The wheels would have turned the other way whether she went the other way or not. I did this when I saw

Rosenbloom start across our track some 10 or 15 feet ahead of
304 us." (S. F., beginning with 7th line counting from bottom on page 34 and reading to the end of 12th line counting from the top on page 35.) * * * "I saw Rosenbloom when he started across that track in front of the ballast car. I believe he was closer to the ballast car than 20 feet—I think he was only 10 or 15 feet from the car when he started across the track ahead of us. I blew the whistle, the four blasts when I saw him 7 or 8 car lengths ahead of the ballast car. That was about 280 feet—might say 300 feet. I stated that I whistled the road crossing whistle but I didn't whistle for a public road crossing. I whistle that whistle but I was not whistling then because there was a road, because there was no road crossing there. That was all the whistling I did. At the time Rosenbloom started across the track ahead of the ballast car we were going somewhere from 5 to 7 miles an hour as well as I can judge. That is about as close as I can come to the speed." (S. F., beginning on page 36 with first word in the 15th line counting from the top and ending with the second line counting from the bottom.) * * * "The wheels of the engine certainly did slip when we applied the emergency brake." * * * We ran about 68 feet after I saw him start across the track in front of us until we stopped. It takes some little time to stop an engine—to make application of the air and reverse, and a little time for the air to take hold, and it took time for me to put the engine over. You can't stop an engine like that right on the spot—you have to take a little time to do that. No, sir, you could not stop an engine like that on the track like it was,
305 with a ballast car attached, running 5 to 7 miles an hour in 68 feet. I done all I could to stop it. I certainly tried to stop it. I saw Mr. Rosenbloom from the time I sounded the whistle something like 7 or 8 car lengths from us until the time he started to cross the track ahead of us. I saw him down the track ahead of us just as I see men that way every day and go right on by them." * * * "There is no danger in running the ballast car and engine down on track 5 with a train moving out on track 4, if a man would stay out of the way. I did not run on him unexpectedly. I blew the whistle at him and he looked around. He knew I was coming." * * * "When I saw Rosenbloom start across the track in front of the ballast car I knew he was in imminent danger and I commenced to try to stop. The air brake is right to the side of me on the boiler and it is nothing in the world but a short lever. That is what we get hold of. There is quite a lot of machinery to air brakes. The part that applies the air to the engine and accomplishes the purpose of stopping the train is just simply a short lever and all you have to do is to move it into a notch. I can move the lever in a second but the brakes won't work that quick. It takes a little time after setting the lever in the notch for it to operate. You can't set them in a quarter of a second. I have been working with air brakes for nearly four years. It depends on what kind of a brake it is as to how long it takes for the brakes to set after you put the lever in the emergency notch. I would say that it would take that brake a second at least to
306 hold after starting the air brake lever in the emergency notch. It would take that much time on any engine at any

rate of speed. If you are going pretty fast you would not know what effect it would have on an engine to throw the emergency brake on with a full charge of air. You would all fall off. It would lock the wheels. On some engines it would lock the wheels. I have been running engines that you could not lock the wheels on it. Probably if the rails were wet. This one was not that kind of an engine but you could lock the wheels on that engine." * * * "It is not a fact that every time the instant you put on the emergency, or the minute the brakes are set, that instantly the wheels stop turning. The wheels don't slide every time you put the brakes in emergency. Sometimes when you put the emergency brakes on it has the effect of locking the wheels. I could slide the wheels on that engine. I didn't try to reverse it but I did reverse the engine on that occasion. The wheels didn't slide 60 feet after I reversed it. I set the air and threw the reverse lever and put it in forward motion. That took a second and more than a second. I set the brakes first and then put the engine in forward motion and then pulled the throttle wide open. I don't know whether the engine wheels made a revolution after that or not. I didn't look at the wheels. I don't know whether they rolled or slid all the way. If you lock the wheels they will go further than if you do not. It makes an impression or has an effect on the tires of the wheels if you slide them a foot. I didn't look
307 at the wheels on this occasion. I know they slid some but I don't know how far. I put the air in emergency on this occasion. I put the air in emergency when I saw Rosenbloom go in front of the ballast car. The switchman gave me the stop signal. I put on the emergency when the switchman gave me the stop signal. Rosenbloom had just started across the track—he had started to cross the track when the switchman gave me the stop signal." (S. F., page 37, beginning with the 16th line counting from the top and reading to the end of the 8th line counting from the bottom on page 40.)

A. D. Thomas, brakeman, on the outgoing train, testified:

"I saw the accident resulting in the death of Rosenbloom in the yards there. I was about 150 feet from Rosenbloom at the time. He was on the ground between tracks 4 and 5 and train No. 30 was pulling out along beside me. (S. F., p. 57, beginning with 3rd line from the top and reading four lines.) * * * "I heard the whistle sounded. The engineer blew the whistle. I didn't understand what was said when the person holloed at * * * Rosenbloom, but I heard someone holloo "Look out." Right after I heard the switchman holloo I saw Rosenbloom take a couple of quick steps toward track No. 5 and the car struck him before he got across. I don't know how many steps he made, but two or three after starting across before he was struck. He moved quickly." * * * "I could not state how far he was ahead of the ballast car when he stepped on the track but I should say he was in 30
308 feet of it. I think Rosenbloom was nearer track No. 5 when the engineer sounded the whistle than he was track 4. In railway parlance I was east of Rosenbloom and Rosenbloom was east of the switch engine when I heard the whistle sounded and

heard someone holloo at him but the direction is really north." (S. F., p. 57, beginning with the 13th line from the bottom and ending with the middle of the 5th line from the top on page 58.) * * * "I saw him start across track No. 5. I saw the ballast car coming. No, I did not know he was in danger, because I expected him to step out of the way." (S. F., beginning near the end of 7th line counting from the top and reading three lines.)

A. M. Briles, a discharged employee, testified:

"If the brakes are in good condition, ought to stop an engine with one empty car attached (in) 6 or 8 feet." (S. F., beginning with last word in the 7th line from the top and reading two lines on p. 31.)

Pat Stewart, a discharged Rock Island employee, testified:

"If the rails are dry they would stop about 5 feet under ordinary circumstances. They would stop as quick as the wheels would stop. If the engine is equipped with Westinghouse brakes and moves 5 or 6 miles an hour they will stop instantly as soon as the air is applied." (S. F., page 32, beginning with the first word in 10th line from the top and reading five lines.)

Authorities.

Ry. Co. v. Oram, 49 Tex., 346.
309 Cotton Press Co. vs. Bradley, 52 Tex., 599.
Ry. Co. v. Hannig, 91 Tex., 350.
Ry. Co. v. Matthews, 79 S. W., 71.
Ry. Co. v. Jackson, 90 S. W., 918.
Ry. Co. v. Hunt, 100 S. W., 968.
Ry. Co. v. Ploeger, 93 S. W., 226.

Argument.

To support our propositions generally and especially to the effect that there was no actionable negligence shown by the testimony, we adopt and refer to, without here repeating, our argument submitted on pages 38 to 41, inclusive, of appellant's brief. We also here adopt and refer this Honorable Court to the 7th and 8th specifications of grounds upon which appellant moved for a rehearing in the Court of Appeals. These are found on pages 7 and 8 of the motion. To the foregoing we add the following:

The only issue is one of discovered peril and negligence as applied to this issue.

As shown in the presentation of the first assignment herein submitted, as well as by appellees' reply to the first assignment presented in appellant's brief, such reply found on the first pages of appellees' brief, there can be no issue of discovered peril where the acts of the injured party are concurrent in time with the alleged acts of defendant resulting in his injury. The injured party's acts may or may not have been negligent. If they are negligent and concur both as a producing cause and in time of performance

with the acts of the defendant, there can be no issue of dis-
310 covered peril. Such issue, in its very name and nature, is based upon the idea that the injured party is, first, placed in a perilous position, second, that he is discovered in such position by the defendant, and, third, that after he is so discovered and known to be in a perilous position the defendant fails to exercise due care to avoid injuring him. Necessarily then, the injured party's acts, in a case of discovered peril, precede in point of time the failure to avoid striking him. The facts in this case show that Rosenbloom and the ballast car were moving in parallel direction, Rosenbloom anywhere from 10 to 30 feet in advance of the car. Haney, the nearest witness, puts it not exceeding 20. He is walking leisurely along. The ballast car is moving anywhere from 5 to 7 miles an hour, most generally estimated at six.

Just here we note that the allegation in the petition is that he started across the track and was thus, by his own act, placed in a perilous position. Such allegation concedes and leads us to presume, as the evidence clearly shows, that he would not have been in such peril but for his so "starting."

While the two bodies, that of Rosenbloom and the ballast car, were so moving Rosenbloom changes his course suddenly and starts quickly to go diagonally across the track in front of the car. If moving six miles per hour the car was moving but a fraction less than 9 feet per second. If moving seven miles it was moving about 10 feet per second. Three seconds is a liberal estimate of the
311 time required to bring the car to Rosenbloom. Rosenbloom moved but two steps, according to Haney, probably three according to Thomas, right in front of the car when his body and that of the car came in contact. Two seconds is a liberal allowance of time within which to take two quick steps. It was the combined movements of Rosenbloom's body and the car that brought them into collision and produced his death. Then how can it possibly be said that the cause of the death was other than the concurrent movements of the car and Rosenbloom's body, or the concurrent acts of Rosenbloom and of the engineer and switch crew running the car? Being concurrent in time, as above stated, there was no issue of discovered peril and no evidence to support the judgment under the charge.

We have argued in our brief above referred to the proposition of actionable negligence disclosed by the testimony. Hence, we here simply submit that there is absolutely no evidence whatever to justify any such conclusion.

Sixth Assignment.

The Court of Civil Appeals erred in all that part of the opinion rendered by it which discusses said fourth assignment presented in appellant's brief, and the proposition thereunder submitted, and concludes by overruling the same; because,

1. The evidence in the record discloses clearly that there is an entire failure to show any actionable negligence upon the part of

the defendant, its agents, servants and employees in the manner and form as stated in plaintiffs' petition.

312 2. The evidence shows conclusively that Rosenblooom's own negligence, without any concurrent negligence upon the part of the defendant, its agents or employees, was the sole producing cause of his death.

3. There is absolutely no testimony whatever to show that Rosenbloom was or became in a perilous position from which he could not or would not extricate himself, and that the engineer, or other employees of the defendant in charge of the switch engine and ballast car, saw or discovered Rosenbloom in such perilous position, and, after so seeing or discovering him in such perilous position, failed to exercise due care to avoid injuring him.

4. The evidence shows clearly and beyond dispute that Rosenbloom walked upon the track immediately in front of the ballast car and the defendant's employees, especially the engineer, could not possibly, after discovering Rosenbloom on the track, or going on the track in front of the car, have avoided striking him with the ballast car in question.

5. The evidence conclusively shows that Rosenbloom's act of negligence, in turning and going upon and attempting to cross the track in front of the moving ballast car, was concurrent with the motion of the train and so close to the train that it was impossible for the engineer to have avoided striking him after seeing him start across the track and place himself in a place of danger. There was no sufficient period of time intervening after Rosenbloom started across the track until he was struck and killed for his perilous

313 position to have been seen and his death avoided by the engineer.

Seventh Assignment.

The Court of Civil Appeals erred in overruling the 5th assignment presented in appellant's brief (on pages 41-2) and the proposition thereunder submitted, the 13th assignment in the record (Tr. pp. 101-102), and the propositions thereunder submitted, which assignment and propositions complained of the action of the court in giving in charge to the jury the fourth division of his charge upon the issue of discovered peril.

It was error to overrule such assignment and proposition-; because said fourth paragraph of the court's charge to the jury was erroneous, in fact it assumed that a failure upon the part of defendant's employees to exercise ordinary care to avoid running over Rosenbloom was negligence and the cause of his death, and does not require the jury to find from a preponderance of the evidence that defendant's employees were negligent and caused the death of Rosenbloom as a condition precedent to returning a verdict for the plaintiff-.

Eighth Assignment.

The Court of Civil Appeals erred in all that part of the opinion rendered which discusses the fifth assignment presented in appel-

lant's brief and holds that paragraph 4 of the court's charge properly submitted to the jury the law of the case and concludes by overruling such assignment; because such charge does not correctly present the law of the case, and was prejudicial error.

314

Ninth Assignment.

The Court of Civil Appeals erred in overruling the sixth assignment presented in appellant's brief and the two propositions thereunder submitted (pages 43-46), the 18th in the record (Tr., 103), which assignment and propositions complained of the act of the trial court in refusing to give in charge to the jury special charge No. 9 requested by defendant.

It was error to overrule such assignment; because,

1. The requested special charge properly stated the issue as to the liability arising from the pleadings and the evidence, and directed the jury's attention to the issue as made, and neither the general nor the special charge of the court so states and submits the issue, but submits the issue in a general form and in a confusing manner, and does not properly state the law of the case.

2. The special charge prepared and given by the court in lieu of special charge No. 9 requested by defendant fails properly to state to the jury any issue or principle of law applicable to this cause, but is confusing and unintelligible.

Statement.

For statement under this assignment without here repeating, we adopt the statement under the first proposition submitted under this assignment on page 43 of appellant's brief.

Argument.

315 The opinion of the Court of Civil Appeals admits that the law and the facts raise the issue shown to have been presented by the special charge, but objects to the language, becoming, as we see it, hypercritical. If the charge were subject to such criticism (as it is not) it was sufficient to have required the trial court to give a correct charge upon the issue.

Tenth Assignment.

The Court of Civil Appeals erred in all that part of the opinion filed herein, wherein it discusses said sixth assignment and overrules the same, for reasons as follows:

1. Said opinion misconstrues and misapplies the special charge requested by defendant and refused by the court.

2. The law of discovered peril requires before a duty arises to avoid injuring one in a perilous position, it is necessary for the employee discovering the one in a perilous position to have in fact discovered the party's position and that such position was perilous, and further, the circumstances must be such as that the employee so discovering is not authorized to rely upon the presumption that a party

in a particular position will exercise his own senses and own natural instincts to save himself. The special charge requested by defendant so presented the law and the general charge and special charge prepared and given by the court do not so present the law.

3. Under the law, the mere fact that employees in charge of a railroad train seeing a man ahead of a train on the track at a
316 place where there is no public crossing, does not impose upon them the duty of attempting to stop the train, there must be some further indication that the man is in peril. Though it is the duty of an engineer in charge of a railroad train to keep a lookout for persons on the track, and though the company is chargeable with knowledge of what it is a duty to see, yet it is only when there is some reason for him to apprehend that a person so on the track will not leave it in time to avoid danger that the duty arises to stop the train. Therefore, that part of the opinion of the court, on pages 21 and 22, discussing the merits of the charges given and refused, is erroneous. Such parts of the opinion of the court are erroneous, and said court is in error in overruling said assignment and proposition; because the undisputed evidence shows that Rosenbloom stepped on the track immediately in front of the ballast car, having taken only two steps as if to cross the track when he was struck. The bare fact that he was struck before he could cross the track shows that the car was too close for the engineer to have prevented striking him.

Eleventh Assignment.

The Court of Civil Appeals erred in overruling the seventh assignment presented in appellant's brief, the 20th in the record, and the proposition thereunder submitted. (Tr. pp. 48-49), the 20th assignment in the record. (Tr. 104), complaining of the refusal of the trial court to give in charge to the jury special charge No. 12 requested by the defendant, which charge sought to have submitted to the
317 jury the law as to the time when the duty arose to avoid injuring M. A. Rosenbloom in a position of discovered peril.

It was error to overrule such assignment and propositions; because said special charge properly stated and presented the law upon such issue which was nowhere properly presented to the jury in the charge of the court, but the trial court had erroneously given a special charge prepared by the court and refusing special charge No. 12 requested by defendant.

Statement.

The seventh assignment in appellant's brief is as follows:

The trial court erred in refusing to give in charge to the jury, special charge No. 12 requested by Defendant, which is as follows: 'The court charges the jury that the duty of the defendant's engineer and employees in charge of the switch engine and ballast car in question to exercise care to avoid striking M. A. Rosenbloom in a position of discovered peril would not arise until M. A. Rosenbloom was in fact in a perilous position, and until he was known by such employees of the defendant to be in such perilous position, and that he could not or would not be able to extricate himself from such perilous

position; and unless they discovered him in such perilous position and failed to exercise due care to avoid injuring him, after so discovering him in such perilous position, you will find for the defendant.'"

318

Twelfth Assignment.

The Court of Civil Appeals erred in that part of the opinion rendered discussing the seventh assignment presented in appellant's brief and the proposition thereunder submitted; because the law is as stated herein-above and in said special charge. While the Company was chargeable as though it had seen what the engineer ought to have seen, the evidence in this case is clear and undisputed, there being no evidence to the contrary, that Rosenbloom was in no danger until the moment he started to cross the track immediately in front of the ballast car, and the essential facts, regardless of expert opinion, and other opinions, show that the defendant's engineer was not negligent after seeing Rosenbloom start across the track. The witnesses say that Rosenbloom had barely started across, moving rapidly, and had taken only two long steps at the time he was struck. If he was moving rapidly and had taken only two steps in going across the track, he could have gotten out of the way of the car if it had been far enough from him for the engineer possibly to have stopped it before it struck him. It matters not how far the engine ran after it struck him, because it is the striking and running over him that caused the injury. The evidence further shows, as is set out in appellant's original brief and in its supplemental brief filed in the Court of Civil Appeals, that the defendant was not negligent at all, and that there is no element of discovered peril in this cause at all.

319 Wherefore your petitioner prays this Honorable Court that Writ of Error be issued to the Honorable Court of Civil Appeals within and for the Seventh Supreme Judicial District and that notice thereof be served upon J. A. Stanford and H. H. Cooper, Attorneys of Record for defendants in Error, and who reside in Potter County, Texas, and that upon a final hearing hereof the judgment of the trial court and of the Court of Civil Appeals be reversed and judgment here rendered for the appellant, or, in the alternative, that said cause be remanded for new trial in the trial court in accordance with the proper rules of law promulgated by this Court, for costs of suit, etc.

TERRY, CAVIN & MILLS,
Galveston, Texas;
MADDEN, TRULOVE & KIMBROUGH,
Amarillo, Texas,
Attorneys for the Plaintiff in Error, the P. & N. T. Ry. Co.

(Endorsed:) App. No. 7519. In the Supreme Court of the State of Texas. The Pecos & Northern Texas Ry. Co., Plaintiff in Error, vs. Mrs. M. A. Rosenbloom, et al., Defendants in Error. Application for Writ of Error. Filed in the office of the Clerk of the Court

of Civil Appeals, Seventh District, at Amarillo, this the 23rd day of December, 1911. J. M. Oakes, Clerk of Court of Appeals, Seventh Supreme Judicial District. Filed in the office of the clerk of the Supreme Court of Texas, at Austin, this the 28th day of Dec'r 1911, F. T. Connerly, Clerk of the Supreme Court. Granted.

320 *Appellee's Reply to Application for Writ of Error.*

In the Supreme Court of the State of Texas, at Austin.

No. —.

THE PECOS & NORTHERN TEXAS RY. CO., Plaintiff in Error,

vs.

MRS. M. A. ROSENBLOOM et al., Defendants in Error.

Appellee's Reply to Application for Writ of Error.

To the Honorable Supreme Court of the State of Texas:

Without repeating any argument used in our Brief, we desire to submit this brief reply to Appellant's Application for Writ of Error.

Preliminary Statement.

As shown by both the pleadings and evidence in this case, Plaintiff in Error is a Texas Corporation extending from Amarillo to Texico, and owns extensive yards in Amarillo. M. A. Rosenbloom, at the time of his death, had been in the service of Appellant about a month as Seal Clerk in the yards at Amarillo. At about 6 P. M., on November 27th (about quitting time), a long freight was leaving Appellant's yards on track No. Four, going north, and M. A. Rosenbloom was walking by the side of said freight train, and between tracks Nos. Four and five, and going in the same direction
321 as said freight train. A switch engine in charge of switch crew, employes of Appellant, pushing a ballast car, approached M. A. Rosenbloom from behind, going in the same direction as the freight train.

When the switch engine and ballast car came along by the side of said freight train, the space between them was very narrow. When the front end of the ballast car was within from fifteen to thirty feet of Rosenbloom, he started obliquely across track No. Five, and was struck by the ballast car and switch engine and killed. The engineer and two brakemen in charge of the switch engine and ballast car, all saw Rosenbloom start across Track No. Five, and realized he was in im-inent peril when they saw him start. The engineer testified that as soon as he saw Rosenbloom start across the track (No. 5), he did all in his power to stop the engine and ballast car. He ran about sixth-five feet after seeing Rosenbloom start across the track before he stopped the engine and ballast car. Two experienced engineers testified that he could have stopped the engine and ballast car in

from six to ten feet. J. N. Haney, Jr., one of the brakemen, testified he had seen this same engineer with the same engine and a ballast car on same character of track and running at the same speed, stop in from eight to ten feet. The preponderance of the evidence tends to show that Rosenbloom did not know the engine and ballast car was approaching until the ballast car struck him. Discovered peril was the only ground of recovery submitted by the court.

322 Appellees' Counter Proposition under Appellant's First and Second Assignments.

The Court of Civil Appeals was correct in overruling Appellant's First and Second Assignments, and thereby holding that the trial court was correct in refusing to submit the question of Contributory Negligence.

Authorities.

See Art. 3268, Sub. Div. 6, Revised Statutes.
Cannon *vs.* Vaughn, 12 Tex., 399.

Remarks.

It is not conceded either by Appellees' counsel or by the Honorable Court of Civil Appeals as shown by its opinion, as Appellant's counsel seems to think, that Rosenbloom was shown to have been guilty of negligence, causing or contributing to his death. It is Appellees' contention that Rosenbloom was unaware of the approach of the engine and ballast car until the front end struck him in the back. That when the front end of the ballast car was within fifteen to thirty feet of him, approaching him from behind, he, unaware of the approach, started diagonally across the track on which it was approaching, and that the employes of Appellant in charge of the engine and ballast car were looking at Rosenbloom when he started across and that they at once realized that he was in imminent peril of being run over and killed, and realized said fact in time, by the exer-
323 cise of ordinary care, which, under the circumstances, required them to use all the means at their command, to avoid running him down, and that they failed to exercise such care, and as a result of their failure of such duty, Rosenbloom was run down and killed.

Rosenbloom may have been negligent in failing to look back to see if any engine was approaching on Track No. Five, and that may have been the first cause in the chain of events leading up to the present dangerous condition, but if so, that was a past and remote cause; that was past History so to speak. The switch crew saw him unconsciously walking into the jaws of death, they were called upon to deal with a present dangerous situation. It was in their power to save him, his life was in their keeping, they had the "last clear chance" to save a human life, and the dictates of humanity demanded that they "exercise reasonable care," they failed in this duty, and a life is crushed out.

As is said by Judge Neill in G. H. & S. A. Ry. Co. v. Murray, 99 S. W., 144, "The doctrine is that the party who last has a clear chance opportunity to avoid the accident, notwithstanding the negligence of the other party, is considered by the law solely responsible for it. The negligence which arises from discovered peril has its origin in humane principles, and however negligent or culpable may be the act of another which placed him in peril, the law in its regard for human life takes no account of it, but says to him who has discovered the peril, you cannot pursue your business at the expense of life or limb of a human being, but if by the exercise of all
324 the means within your power, consistent with your own safety, you can stop its progress in time to avoid such a calamity, it is your duty to do so," * * * "The effect of the principle of discovered peril is the recognition of an act of negligence which destroys and renders ineffective all other negligent acts of either party, an act that swallows them all, as Aaron's rod did all those of the Egyptian Magicians, and then alone has existence."

This is the rule in every State in the Union, and the Supreme Court of the United States, and has been for at least fifty years. It has been the rule in Texas for Forty years. It is the outgrowth of Civilization—has its origin in humane principles, it is the product of the development of those nobler instincts and feelings of human hearts, that teach man to have a regard for the life of his fellows, which has been crystallized into law by the decisions of the higher courts of all civilized countries, as well as by all standard writers. Yet Appellant contends that the Texas Legislature in order to protect railroads, has by one fell swoop struck down this salutory principle, the outgrowth of a hundred years of advancement, by the enactment of April 13th, 1909, L. S, 1909, 279, and under this Act, in cases of "discovered peril," the railway company has the right, an immunity not enjoyed by anyone else, to have the recovery reduced in proportion to the negligence of the injured party in getting into the position of peril, and that in this case it should be nothing, or at most "only a very small amount." Such was not the intention of the Legislature. This statute was enacted for the benefit of
325 the employe. The Legislature was legislating upon "Contributory Negligence" as it then affected the right of the employe to recover. At the time this statute was enacted it had been the settled law of the land for forty years that in "discovered peril" cases, the negligence of the injured party was not taken into account,—such a thing as contributory negligence in connection with "discovered peril" was not known, in all other cases, if the employe was guilty of contributory negligence, that was the end of his case. The act simply changed the law, which permitted contributory negligence to be plead and proven as a complete bar to a right of recovery on the part of the employe, and provided that, the fact that the employe may have been guilty of contributory negligence shall not bar a right of recovery, but the damages may be diminished, etc.

The statute does not undertake to change the law except in cases where the injured party may have been guilty of contributory negligence. And under the settled law of the land for many years, the

injured party in discovered peril cases, was never considered guilty of contributory negligence. If we keep in view the law as it was at the time this statute was enacted, and the evil intended to be remedied, the point raised by Appellant scarcely rises to the dignity of a new question. Both the lower courts were right in their construction of this statute.

The Court of Civil Appeals correctly overruled Appellant's Third and Fourth Assignments, for the following reasons, to wit:

326 1st. Because the question of the right of Appellant to maintain this suit in the capacity in which they sued was not properly raised, in that Appellant's pleading attempting to raise this question, was not under oath as required by our statutes. Tr. p. 10 Revised Statutes, Art. 1265.

2nd. Because, as is shown by the evidence and the conclusions of fact filed by the Honorable Court of Civil Appeals, Rosenbloom, at the time of his death, was not engaged in Interstate Commerce.

3rd. Because the state law afforded a remedy, and Appellees brought their suit under the State law, and based their right to recover alone upon the State law, and were in no way dependent upon any Federal Statute for a recovery.

4th. Because Appellees' pleadings and evidence made a cause of action cognizable in the State Court alone, and Appellant could not by its answer inject a Federal question.

5th. Because if Rosenbloom had been engaged in Interstate Commerce, and appellees had been relying upon the Employers' Liability Act for a recovery, this would have given no right to removal to the Federal Court, unless the construction of the Federal Statute had been involved. See Nelson vs. Southern Ry. Co., 172 Fed. Rep., 485, which expressly condemns the rule laid down by Mr. Thornton, cited so extensively by Appellant.

327 6th. If Rosenbloom had been engaged in Interstate Commerce, and if Appellees had been relying upon the Employers' Liability Act for a recovery, still our state courts would have had jurisdiction. See the case above cited. Also Amendment of April 5th, 1910, to Employers' Liability Act.

7th. If Rosenbloom had been engaged in Interstate Commerce and if appellees had been relying upon the Federal Employers' Liability Act to establish liability, still, the State Court having jurisdiction, and the suit being in the State Court, the parties designated by the State Statute would have the right to maintain the suit.

Authorities.

See Authorities cited in Appellees' Brief, pp. 6 and 7.

The Court of Civil Appeals correctly overruled Appellant's Fifth Assignment, because the verdict of the jury is amply supported by the evidence.

Statement.

All the evidence shows that Brakeman, J. N. Haney, who was sitting on the front end of the ballast car on the corner next to track No. Four, and Charles Fullington, Brakeman, who was sitting

on the rear end of the ballast car, and next to track No. Four, and J. L. Walker, engineer, in the cab of the switch engine and next to track No. Four, were all looking at Rosenbloom at the time he started diagonally across the track (No. 5) in front of said
328 approaching ballast car and engine.

J. N. Haney testified "I would say the engine and ballast car were moving approximately five or six miles per hour—perhaps five. (See middle of page 5, St. Facts.)

J. L. Walker, the engineer, testified "At the time I saw Rosenbloom start across the track ahead of the ballast car, we were going somewhere between five and seven miles an hour, as well as I can judge—that is about as close as I can come to the speed." (See bottom of p. 36, St. Facts.)

The other brakeman, Charles Fullington, testified "The ballast car was running four or five or six miles per hour—about the same rate a man could walk I suppose." (See sixth line from bottom of p. 54, St. Facts.)

J. N. Haney said that when the front end of the ballast car was in about twenty feet of him, he started obliquely across track No. Five. (See eighth line from top of page 6, St. Facts.)

Engineer J. L. Walker said they were ten or fifteen feet from him when Rosenbloom started across track No. Five. (See bottom of page 34, St. Facts.)

Brakeman Fullington said Rosenbloom was about thirty feet ahead of ballast car at the time he started across the track (No. 5). (See bottom of p. 51, St. Facts.)

A. D. Thomas, brakeman on the outgoing freight, said that Rosenbloom was about thirty feet ahead of the ballast car
329 when he started across. (See bottom of page 57 also bottom of page 59, St. Facts.)

Engineer Walker testified "When I saw Rosenbloom start across the track in front of the ballast car, I knew that he was in imminent danger and I commenced to try to stop. (See ninth line from top, p. 39, St. Facts.)

Both the brakemen saw him start across track No. Five, and realized his peril, but did nothing to prevent killing him.

J. N. Haney testified that he had worked with J. L. Walker on this same engine about thirty days, and had seen him stop within ten to twelve feet when running five to six miles per hour on similar track. (See second line from bottom on p. 23; also 9th line from top of p. 25, St. Facts.)

A. M. Briles testified that an engine running backward can be stopped as quickly as one running forward can be stopped, and that an engine with one empty attached could be stopped in six or eight feet. (See fifth line from top of p. 31, St.)

P. A. Stewart testified that an engine with one empty attached, running five to six miles per hour, could be stopped in five feet under ordinary circumstances. (See sixth line from top of p. 32, St.)

Engineer Walker said "We ran sixty-eight feet after I saw him start across the track in front of us until we stopped." (See second line from bottom, p. 37, St.)

All the crew saw him walking between the tracks when they were

ten car lengths away. Haney said "I do not suppose there
330 was a period of three seconds during that time that I did not see him. I continued to observe Rosenbloom from the time I first saw him until he was run over." (See eleventh line from top of p. 5, St.) "Rosenbloom did not look back during the time to my knowledge." (Fourth line from top of page 6, St.) "I was continuously looking at him so that I could detect every motion of his head or every motion he made." (See sixth line from top of p. 13, St.)

Remarks.

It occurs to us that remarks are unnecessary. Will say, however, in addition to what is said in our brief, on this point, we are at a loss to understand how Appellant's counsel can seriously contend that the evidence is insufficient, and why counsel should continue to reiterate that statement that "Rosenbloom walked upon the track immediately in front of the ballast car", when two of his own witnesses, Fullington and Thomas, said that he was thirty feet ahead of it when he started obliquely across.

We observe further, that counsel has omitted from his statement of the evidence in his petition on this point, the evidence of his witness Fullington. Counsel for appellant may theorize and draw his fine spun distinctions between two bodies moving at the same time to a common point, and that the engineer could not know he was in peril until the engineer realized that Rosenbloom could not or would not save himself, etc. But the fact remains, and coun-
331 sel can't escape it, that the engineer saw Rosenbloom start obliquely across the track in front of the approaching ballast car. That when he (the engineer) saw Rosenbloom so start across the track, he (the engineer) then realized that Rosenbloom was in imminent peril of being run over and killed, for this is the language of the engineer, Appellant's own witness. Rosenbloom was then somewhere between fifteen and thirty feet ahead of the ballast car. Two of Appellant's witnesses, Fullington and Thomas, place the distance at thirty feet. Haney put it twenty feet, the engineer fifteen feet. P. A. Stewart and A. M. Briles, experienced engineers (discharged ones, but not from Appellant's road), said the engineer could have stopped the engine in from five to ten feet. Haney said he had seen this same engineer stop the same engine on similar track, going at the same rate of speed with one empty car attached, within from eight to twelve feet. He had seen this not only one time, but many times. The engineer was on the stand and testified fully, but did not deny Haney's statement.

The engine and ballast car were going slowly. About as fast as a man could walk. Yet engineer Walker admitted that after he saw Rosenbloom start obliquely across the track, and realized that Rosenbloom was in imminent peril of being run over, he ran sixty-five feet before he stopped.

Haney and Fullington both saw Rosenbloom start across the track and realized his danger and doubtless could have saved him, (but made absolutely no effort to save him), by halloaing at him. A

clearer case of negligence on discovered peril could not be made.

332 We have carefully examined the remaining assignments in Appellant's petition, but do not care to say anything in reply thereto, but refer this Honorable Court to what is said in our Brief, and in the opinion of the Court of Civil Appeals.

We respectfully ask that the Petition for Writ of Error be refused.

H. H. COOPER AND
J. A. STANFORD,
Attorneys for Appellee
Mrs. M. A. Rosenbloom.

(Endorsed:) In Supreme Court of the State of Texas. P. & N. T. Ry. Co., Appellant, vs. Mrs. M. A. Rosenbloom, et al., Appellees. Appellees' Answer to Appellant's Application for Writ of Error. Filed in Supreme Court, Jan. 1, 1911. F. T. Connerly, Clerk.

333 *Order Granting Writ of Error.*

January 24th, 1912.

App. No. 7519.

PECOS & N. T. RY. CO.
vs.
MRS. M. A. ROSENBLOOM et al.

From Potter County, Seventh District.

This day came on to be heard the application of Pecos & N. T. Ry. Co. for a writ of error to the Court of Civil Appeals for the Seventh District and the same having been duly considered, it is ordered that said application be granted and the writ of error issue as prayed for.

334 *Citation.*

Issued March 26th, 1914.

The State of Texas to the Sheriff or any Constable of McLennan County, Greeting:

You are hereby commanded, by delivering to Mrs. M. A. Rosenbloom et al., if found in your County, or to J. A. Stanford, or H. H. Cooper, attorney of record, the accompanying certified copy of this writ, to summons said Mrs. M. A. Rosenbloom et al. to be and appear before the Supreme Court of the State of Texas, now in session at Austin, Texas, on Wednesday, the 15th day of April, 1914, provided this writ shall have been served ten days prior to that time; but if this writ shall not have been so served, then on the first Wednesday next ensuing, ten days after such service, pursuant to a writ of error

filed in the Clerk's Office of the Court of Civil Appeals for the Seventh Supreme Judicial District, and issued on the 26th day of March, 1914, wherein Pecos & Northern Texas Ry. Co. is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error should not be corrected, and why speedy justice should not be done to the parties in that behalf. And of this writ, with your action endorsed thereon, make due return within ten days from the date hereof.

Witness, the Hon. T. J. Brown, Chief Justice of the Supreme Court of Texas, the 26th day of March, in the year of our Lord one thousand nine hundred and fourteen.

F. T. CONNERLY, *Clerk*,
By H. L. CLAMP, *Deputy*.

335 I hereby certify, That the above is a true and correct copy of the original.

F. T. CONNERLY,
Clerk of the Supreme Court of Texas,
By H. L. CLAMP, *Deputy*.

(Endorsed:) No. 2364. In Supreme Court. Pecos & Northern Tex. Ry. Co. vs. Mrs. M. A. Rosenbloom et al. Citation. Issued March 26th, 1914. F. T. Connerly, Clerk, Supreme Court, by H. L. Clamp, Deputy. Certified copy.

Sheriff's Return.

Came to hand on the 27th day of March 1914, and executed on the 30th day of March, 1914, by delivering to J. A. Stanford in person true copy of this writ of Certified copy and the original returned this the 30th day of March, 1914.

S. S. FLEMING,
Sheriff McLennan County, Texas.

Fees $.75.

336 *Order of Submission.*

April 15, 1914.

No. 2364.

PECOS & NORTHERN TEXAS RY. CO.
vs.
Mrs. M. A. ROSENBLOOM et al.

From Potter Co., Seventh District.

Submitted upon briefs and orally for both parties.

337 *Opinion by Mr. Chief Justice Brown.*

February 10th, 1915.

No. 2364.

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

Mrs. M. A. ROSENBLOOM et al., Defendants in Error.

(From Potter County, Seventh District.)

Mrs. M. A. Rosenbloom, for herself and as next friend of her minor children, Milton and Matilda Rosenbloom, and also for the use and benefit of Minnie and Isaac Rosenbloom, instituted this suit in the District Court of Potter County, against the Pecos & Northern Texas Railway Company, to recover damages occasioned by the negligent killing of her husband, M. A. Rosenbloom, who was father of her children and the son of Minnie and Isaac Rosenbloom.

We make the following condensed statement of the facts as found by the Court of Civil Appeals, to-wit:

M. A. Rosenbloom was in the employ of the railway company as a clerk, and a part of his duty was to take the numbers and other necessary descriptive matter of cars going out in the trains that left Amarillo. There was a train of cars standing on the main track in the railway yard at Amarillo, on which M. A. Rosenbloom was
338 engaged in his work of checking up the cars and getting the numbers for the purpose of making a proper report of same. There was a side-track, which ran parallel to the main track on which the train stood, at which he was working, that lay very near to the main track, so near that if a man were to stand between the cars on the main track as they were and the other cars passing by, he would be in danger of being knocked down by the passing cars. On the side track there was a locomotive and tender, which was, for some purpose not necessary to mention, passing on the side-track so that it would pass by the cars on which Rosenbloom was at work. Discovering the engine coming when it was near him, Rosenbloom undertook to pass over in front of the approaching engine, in order to escape the danger of being struck at a place between the cars. The engineer on the locomotive which was approaching on the side-track saw Rosenbloom on the track, but did not check the speed of his engine, and it caught Rosenbloom on the track and killed him. It does not appear in the statement of facts that any notice was given to Rosenbloom so that he might have escaped before the engine came so near to him.

There is no question in the case as to the relation of the plaintiffs to Rosenbloom. There is no evidence of negligence on his part, except the fact that under the conditions he attempted to make his escape on the side-track in front of the approaching engine. The engineer, as we have stated, saw Rosenbloom as he started across the

track, and testified that he made some attempt to stop the engine but failed to do so.

339 No question is made as to the amount of the verdict in this case, nor is it attempted to show that Rosenbloom was guilty of negligence except as stated above. The plaintiff in error submits to this court two propositions, as follows:

First. That the plaintiffs have no right to recover in the character in which they sue, because Rosenbloom was engaged in interstate commerce at the time he was killed, and therefore they must be governed by the Federal Liability Act.

Second. That the court erred in refusing to give the jury the charge requested by the defendant on the subject of contributory negligence by Rosenbloom.

The Court of Civil Appeals found and so state in the opinion that there was no evidence before the court upon which they could say that Rosenbloom was engaged in interstate commerce at the time, even if it be held that the work he was doing would constitute interstate commerce, provided there were any cars in that train which were carrying interstate freights. It was not shown that there was any freight of such character, or any car destined to points beyond the state in the train on which Rosenbloom was engaged at the time. Since the question is not raised by the facts found by the court it is unnecessary for us to discuss the question as to whether he would be so regarded if it were true that the cars were loaded with interstate freight. That question is very important and not free from difficulty, and therefore we refrain from expressing an opinion where it is not called for by the facts of the case.

The District Court submitted but one issue to the jury,

340 that is, the issue of discovered peril, whether the operative of the engine discovered Rosenbloom on the track when he was in danger in time to have prevented injuring him, and failed to use all necessary efforts to avoid killing him. It therefore follows that unless the operatives of the engine were guilty of that negligence and of killing the man after they knew of the danger, no recovery could be had, and it is beyond all question the law that the negligence of the party killed will not excuse the act of killing him. If it did, there could be no such recovery as provided for under the rule. It matters not that a man may be negligent, in fact, that he may be wholly disregardful of his own safety, yet it is true that the law will not permit operatives on a train to run upon a negligent party and destroy his life because he is negligent. The negligence of the party killed is no defense to an action based on discovered peril. Therefore the District Court did not err in refusing to submit the charge to the jury as to his negligence.

The defendant's claim for a reduction of damages on account of the negligence of the deceased is based upon the following provision of our statutes; Art. 6649, Vernon's Sayles' Statutes.

"Contributory negligence, rule as to.—In all actions hereafter brought against any such common carrier or railroad under or by virtue of any of the provisions of the foregoing article, and the three succeeding articles to recover damages for personal injuries

to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. * * *"

341 This statute applies only to cases in which the defendant might make his defense on account of the negligence of the party injured. It cannot apply to a case in which the negligence of the party deceased constitutes no defense to the action, and as we have shown in this case that the negligence of the deceased would constitute no defense to the action, therefore there could be no reduction of damages recovered by reason of the killing in a case where the law of discovered peril determines the rights of the parties. The Court therefore properly refused to give the charge to the jury. We find no reversible error in the proceedings of the court, and the judgments of the District Court and the Court of Civil Appeals are therefore affirmed.

Opinion delivered Feb. 10, 1915.

T. J. BROWN,
Chief Justice.

(Endorsed:) No. 2364. Pecos & N. T. Ry. Co. vs. Mrs. M. A. Rosenbloom, et al. Opinion. Judgments Affirmed. Filed in Supreme Court, Feb. 10, 1915. F. T. Connerly, Clerk. Mr. Chief Justice Brown.

342 *Judgment.*

February 10th, 1915.

No. 2364.

PECOS & NORTHERN TEXAS RY. CO.
vs.
Mrs. M. A. ROSENBLOOM et al.

From Potter County, Seventh District.

Opinion Delivered by Chief Justice Brown.

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Seventh Supreme Judicial District and the original transcript in said cause being before the Court as well as the transcript showing the proceedings had in said Court of Civil Appeals and these having been duly considered, because it is the opinion of this Court there was no error in the judgment of the Court of Civil Appeals and District Court, it is therefore considered, adjudged and ordered that said judgments be affirmed; that the defendants in error, Mrs. M. A. Rosenbloom, Milton Rosenbloom, Matilda Rosenbloom, Isaac Rosenbloom, and Minnie Rosenbloom do have and recover of and from the plaintiff in error, Pecos

and Northern Texas Ry. Co. and its sureties, Ray Wheatley and Chas. A. Fisk, the amount adjudged in the District Court together with all costs in this behalf expended in this Court and in the Court of Civil Appeals and this decision be certified to the District Court for observance.

343 *Motion for Rehearing.*

Feb. 24th, 1915.

In the Supreme Court of Texas.

THE PECOS & NORTHERN TEXAS RY. CO., Plaintiff-in-Error,
vs.
Mrs. M. A. ROSENBLOOM et al., Defendants-in-Error.

Motion for Rehearing.

To the Honorable Justices of the Supreme Court of Texas:

Now comes the Pecos & Northern Texas Railway Company, plaintiff-in-error, and moves the Honorable Court to set aside the judgment of affirmance rendered herein on the 10th day of February, 1915, whereby this Court affirmed the judgments of the trial court and the Court of Appeals, and to grant it a rehearing, and, on rehearing to reverse such judgments and here render judgment in its favor as prayed in its application for writ of error to this Honorable Court; and, in support of this motion, plaintiff-in-error resubmits and now here again urges and insists upon each and all the several assignments, propositions, statements, authorities and arguments heretofore submitted in the Court of Appeals (as contained in appellant's briefs and arguments in said Court),
344 and in this Court (as contained in its application for writ of error, briefs and arguments), and, in addition thereto the following special additional specifications, to-wit:

1. This Court has particularly erred in finding and holding, as is recited in the opinion handed down, that "It was not shown that there was any freight of such character (Interstate), or any car destined to points beyond the State in the train on which Rosenbloom was engaged at the time;" because it was clearly and undisputably shown, the Court of Civil Appeals finds, and it has never before been controverted, that the whole train, excepting one car of well drilling tools in use by the companies, was interstate, moving from points in California, Arizona, New Mexico, and other places, through Amarillo, Texas, and from thence to Wyanoka, Oklahoma, on their way to destination in Oklahoma, Missouri, Illinois, and other States.—See opinion of Court of Appeals 141 S. W., p. 178, 2nd col., (9) near bottom of page; the testimony of Conductor Dodridge, S. F., beginning at top on page 48 and ending at bottom on page 49; and the testimony of Avery Turner, beginning with 6th line from top on p. 75 of S. F., and reading to middle of p. 76.

2. This Court has erred in that part of the opinion filed herein which recited, "Since the question is not raised by the facts found by the Court, it is unnecessary for us to discuss the question as to whether he (Rosenbloom) would be so regarded (as an employee engaged in interstate commerce), if it were true that the cars were loaded with interstate freight;" because (*a*) The question was raised by the facts testified to in the trial court and affirmed by the
345 Court of Appeals, as is cited in specification 1 above, and (*b*) Rosenbloom being a yard clerk whose principal duties were to examine incoming and outgoing trains and to make a record of the numbers and initials on the cars, to inspect seals and make a record of the seals on the car doors, etc., while so engaged on a train carrying interstate freight, and until he had returned to the office from such work, was en employee of an interstate carrier and himself engaged in interstate commerce, so that, he having been killed while so engaged, the rights and remedies, if any, to recover damages for his death, are fixed and regulated exclusively by the federal law, to the exclusion of the State law.—See St. L. S. F. & T. Ry. vs. Seals, 229 U. S. 156, reversing 148 S. W. 1099; N. C. R. Co. v. Zachary, 232 U. S., 248; E. Ry. Co. of N. M. v. Ellis, 153 S. W., 701.

3. This Court erred in that part of the opinion filed herein which says, "The Court of Civil Appeals found and so states in the opinion that there was no evidence before the court upon which they could say that Rosenbloom was engaged in interstate commerce at the time, even if it be held that the work he was doing would constitute interstate commerce, provided there were any cars in the train which were carrying interstate freight." Such holding is erroneous, because: (*a*) Since the non-committal, undecided expression of the Court of Appeals in this case, other adjudications have made it plain that Rosenbloom, engaged in his duties as yard clerk working on and checking up incoming and outgoing trains conveying interstate freight, being at the time "engaged in his work of checking up the cars and getting the numbers for the purpose of making a proper report of same," as is recited by this Honorable Court, was engaged in interstate commerce, so that this court should have so held
346 and reversed the judgment of the trial court and of the Court of Appeals and dismissed this cause without prejudice to the right of the administrator of the estate of Rosenbloom.—See "Employee Engaged in Interstate Commerce." Fed. Statutes Ann., Supplement 1914, p. 823-824; M. K. & T. Ry. V. U. S. 231 U. S. 112, 119; St. L. S. F. Ry. v. Seals, 229 U. S. 156; Peterson v. Ry., 229 U. S. 146. (*b*) The work Rosenbloom was engaged in was "Interstate Commerce," as is shown hereinbefore, so that it was error for the court of appeals and as well for this court to say that he was not or to pass the question undecided.

4. Even if it were a controverted issue of fact as to whether Rosenbloom was engaged in interstate commerce at the time of his death, as indicated by the opinion of the court of appeals and of this court in the opinion filed herein, it was a question for the jury to decide,

so that the trial court should have given in charge to the jury special charge No. 13 requested by defendant. The refusal of this charge was complained of before the Court of Civil Appeals, by the Third Assignment of Error therein presented, on pages 31 to 34 of Appellant's Brief, and the overruling of such assignments and the propositions thereunder submitted is made the Fourth Assignment presented in the application to this court for writ of error. Hence there is error in the action of this court in refusing to reverse and remand on account of the refusal of the trial court to give such special charge, even if the facts were such as to have left the Court of Appeals in doubt as is recited by their opinion. Also, it was error for the Court of Appeals to have expressed a doubt, because the facts are beyond a doubt to the effect, as found by this Court, that Rosenbloom
347 was engaged on the outgoing train, which carried interstate commerce, so that by force of law, he was engaged in interstate Commerce.

5. This Court has erred in its construction and application of the law and facts as disclosed by the Court of Appeals; because that Court admitted, tacitly, appellant's contentions as to Rosenbloom and the outgoing train and crew being engaged in interstate commerce, and held (1) That the switch engine crew were no- so engaged, and (2) Because the switch engine crew, which killed Rosenbloom, were no- so engaged, the federal law did not apply, though Rosenbloom and the outgoing train were. Such ruling was error, and this court has erred in affirming such ruling, of which vigorous complaint is made by and under the fourth assignment of error presented in the application for writ of error to this court, beginning on page 16 thereof and especially in the argument beginning on page 22 and ending on page 35. Such ruling was error because (1) It is immaterial whether the switch crew were engaged in interstate commerce or not, if the outgoing train and Rosenbloom were so engaged; and (2) There is evidence tending to show that the switch crew were so engaged.—See Behrens v. I. C. R. Co., 192 Fed., 591, and cases above cited.

6. This Court has erred in that part of the opinion handed down, and as well in the holding based on that part of the opinion handed down, which says: "There was a side-track, which ran parallel to the main track on which the train stood, at which he was working, that lay very near to the main track, so near that if a man were to stand between the cars on the main track as they were and
348 the other cars passing by, he would be in danger of being knocked down by the passing cars." With profound regard and respect for this Honorable Court, we feel constrained to insist that no such contention, statement of finding is to be found in the record or the opinion of the Court of Appeals. Appellee's counsel, upon the trial in the trial court, contended that the space between the tracks on which the cars were moving was such that one caught between two moving trains on these tracks without warning was liable to become confused and do something to cause him to get hurt, but never contended that there was any danger otherwise on

account of the space, as we are able to recall or find in the record. Haney, plaintiff's star witness would not attempt to state the space definitely but estimated it from four to five feet. S. F. p. 3. O'Donnell and Roach, yard-master and civil engineer, who had taken exact measurements, gives the distance between the rails as 8.33 feet, and the distance between cars while passing on the tracks as from 4 to 4.71 feet.—See S. F. beginning top of page 44 and going to middle of page 45, and at middle of page 63 to middle of page 65.—Avery Turner had walked between moving trains on these tracks and experienced no danger.—See S. F. bottom of p. 76 to middle of page 77. Hence this court errs in holding that when the engineer saw Rosenbloom between the tracks, he saw him in a place of danger, so as to introduce the issue of discovered peril, when, in truth he was in no danger until he started across the track, which was so nearly the same time as when he was struck that his negligence was a concurrent, if not the only cause of his death, and there is no issue of discovered peril in this case.

7. This Court has erred in that part of his opinion handed
349 down herein which says that: "The engineer did not check the speed of his engine and it caught Rosenbloom on the track and killed him." This finding is error because all the testimony is that the engineer had slowed down four or five car lengths back and was slowing down to hitch on to a car they were approaching, except the testimony of Haney and Haney's testimony is negatively to the effect that if he did slow down he did not notice it.

8. This court has erred in that part of the opinion which says: "It doesn't appear in the Statement of Facts that any notice was given to Rosenbloom so that he might have escaped before the engine come so near to him." This recital is clearly against the testimony, Haney, star witness for Rosenbloom, testified, saying: "I hollered at Rosenbloom when we were about five car lengths from him. I do not remember having hollered at him when we were about fifty feet away from him. As I recall it was four or five car lengths from me to him when I hollered at him one time. I do not think I hollered at him when I was 50 feet from him. If I hollered at him within 50 feet I do not remember it." See Statement of Facts beginning with middle of 8th line top on page 13 and reading seven lines. Haney testified that the whistle was blown four blasts, the last one being about the time Rosenbloom was struck, S. F. p. 14 reading entire page. Walker testified that he blew the whistle four times when Rosenbloom was seven or eight car lengths ahead of him and that the bell was ringing all the time. S. F. p. 34, beginning with the second paragraph, the 9th line from the top of page 34 and reading to the bottom of the page. He also says that Rosenbloom looked back when he blew the whistle. Begin-
350 ning with the second word in the 5th line from the top of page 39 and reading the remainder of that paragraph.

Bullinger, the fireman, says that the engineer blew the whistle four or five car lengths back and that he was ringing the bell all the time. See Statement of Facts, p. 42, beginning with Bullinger's testimony

about middle and reading remainder of his testimony down near bottom of page 43.

Fullington, the brakeman, says he warned Rosenbloom by hollering at him when he was a car and a half ahead of the car and that Rosenbloom then looked back. S. F. p. 51, beginning with the last paragraph from the bottom and reading through that paragraph and on to the cross examination on middle of page 52. He also corroborates the engineer's statement as to the blowing of the whistle and Rosenbloom looking back. S. F. 51 as above cited and also 55 beginning with the 7th line from the top and reading through that paragraph.

Thomas, who was brakeman on the outgoing train and was north of Rosenbloom who was north of the switch engine heard this warning and testified that they attracted his attention. See S. F. beginning with the 4th word in the 16th line from the top of page 57 and reading to the end of the first line at the top of page 58.

9. This Court has erred in that part of the opinion which reads: "There is no evidence of negligence on his (Rosenbloom's) part, except the fact that under the contentions he attempted to make his escape on the side-track in front of the approaching engine." We think that this holding is error upon the part of the court as
351 the evidence is clear and beyond dispute that Rosenbloom was there at work and had been for sometime; that he knew the yards and that there were several switching crews working on the yards and continually passing to and fro on the track, and that regular trains were going and coming; that if he did not look back while walking and working between tracks 4 and 5, he was negligent for not looking, and if he did look back he was negligent in not getting at a safe distance between the tracks and staying there as clearly he could have done this, and there was no danger at all had he gotten out of the way sooner, because, under the testimony of Haney he had taken only two quick steps inside of the danger line until the train hit him. So that the train going from five to six miles an hour must necessarily come in contact with him, it being beyond the power of the engineer to have stopped the engine while he was taking those two quick steps. It seems to us, under the undisputed facts, clear that whether you could credit Haney's testimony or whether you could credit the testimony of all the others, it shows that he was warned and looked back and saw the train and waited so long to get out of the way, you must find that Rosenbloom was negligent beyond the mere fact of stepping in front of the train. This Court has erred, as above stated, in holding that plaintiff had a right to sue and recover in the capacity in which she sued and that that the federal statute does not control in the matter of her right to recover and the manner in which she can sue and recover.

10. This Court has erred in sustaining the ruling of the Court of Civil Appeals and the trial court to the effect that the evidence raised *and* justify the trial court in submitting this cause to the jury upon the issue of discovered peril. It was error, because, as shown
352 hereinbefore, Rosenbloom was negligent in remaining between the tracks whether he looked back or not, until the

engine and ballast car were so near to him he could not cross track No. 5, on which the engine and ballast car were moving and clear the same before being struck, and then suddenly trying to cross when it was too late, leaving a place of safety for a place of danger, and because he was not in danger until he did start across the track in front of the engine, and when he started his movements and action were concurrent in time with the movements of the engine and car so that if it be conceded that the engineer was negligent his negligence and that of Rosenbloom was concurrent in time, showing that no issue of contributory negligence could arise under the facts of the case, it being essential to make out a case of discovered peril that Rosenbloom's negligence must have precede- that of the engineer and the engineer must have discovered him in a position of danger, and have been able, by the exercise of due care to have avoided the injury after discovering the danger.

11. This Court has erred, we respectfully submit, in holding because the court submitted the issue and it was tried upon the issue of discovered peril, the rule of contributory negligence as set forth in Article 6649 of Vernon Sayles' Statutes has no application, and that the defendant in the trial court had no right to have such issue submitted to the jury for the purpose of reducing damages. Such ruling is erroneous because the wording of the statutes is general and applied to the cause and its purposes and intent is clear as set forth in the first and second assignments presented in the application for writ of error beginning on page 5 and ending on page 16 of said
353 application. The language of the opinion indicates that the writer thereof was very decidely of the opinion, as therein expressed, but it seems to us that the rulings of statutory construction is entirely against such contention and that there is not authority to support it except a statement by Judge Moursund in the case of Railway v. Walters, 161 S. W. p. 921, first column. The authorities there cited do not support the Judge's statement as we are able to understand. If so, we insist that this court should reconsider and consider thoroughly before making such ruling of law, it being entirely fair and just that every one should contribute to a loss in proportion to his being the cause for that loss.

12. We will insist that the Court has erred in matters as hereinbefore specified, and in details as we hope to point out and show by further statements and citations of authorities which we hope the court will permit us to file in the form of a brief written argument in support of the foregoing specifications of error.

The firm of Cooper & Stanford, who formerly resided in Amarillo, Texas, composed of H. H. Cooper now of Houston, and J. A. Stanford, who is now at Waco, were the attorneys of record for the Appellee, Mrs. M. A. Rosenbloom, and Mrs. M. A. Rosenbloom herself resides in Amarillo, Potter County, Texas.

Wherefore, the plaintiff in error most respectfully and earnestly prays this Court for a rehearing and reconsideration of the matters hereinbefore set forth and that notice of such rehearing be served in

the manner provided by law, and that upon such rehearing
354 judgment be rendered for plaintiff in error, as prayed, for in its original application for writ of error.

Respectfully submitted.

TERRY, CAVIN & MILLS,
Galveston, Texas;
MADDEN, TRULOVE, RYBURN & PIPKIN,
Attorneys for Plaintiff in Error,
Pecos & Northern Texas Railway Company.

(Endorsed:) Motion No. 3390. No. 2364. In the Supreme Court of Texas. The Pecos & Northern Texas Ry. Co., Plaintiff-in-Error, vs. Mrs. M. A. Rosenbloom et al., Defendants-in-Error. Motion for Rehearing. Filed in Supreme Court, Feb. 24, 1915. F. T. Connerly, Clerk, by H. L. Clamp, Deputy.

355 *Opinion on Motion for Rehearing.*

June 26th, 1915.

No. 2364.

THE PECOS & NORTHERN TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
Mrs. M. A. ROSENBLOOM et al., Defendants in Error.

(From Potter County, Seventh District.)

On Motion for Rehearing.

The opinion delivered in the case by the late Chief Justice Brown on the original hearing, in its statement of the case, is corrected in the following particulars so as to conform to the findings of facts made by the Honorable Court of Civil Appeals:

At the time of Rosenbloom's death a freight train of the plaintiff in error was leaving its yards in Amarillo upon track No. 4, moving out slowly upon the track. Just before his death, Rosenbloom was walking between track No. 4 and track No. 5, immediately adjacent, in the same direction the train was moving. The Court of Civil Appeals has found that the testimony did not disclose for what purpose Rosenbloom was walking between the tracks by the side of the moving train, or what he had been doing, if anything, just before the accident. This freight train was composed of cars which had
356 come in from New Mexico over the line of the railway company and were destined for points without the State of Texas, except one car destined for a point within the State of Texas. The original opinion was possibly further inaccurate in stating that the space between the tracks was so narrow that one standing between them with cars upon one of the tracks was in danger of being knocked down by passing cars upon the other.

It is urged by the Railway Company that Rosenbloom, as its employe, was engaged in interstate commerce at the time of his injury, subjecting the asserted cause of action to the government of the Federal Employer-' Liability Act. This contention is based upon the fact that the freight train by the side of which Rosenbloom was walking just before the accident, carried interstate freight, and that Rosenbloom was a yard clerk whose duties included the examination of such a train and the making of a record of the numbers and initials on the cars, and the inspection and making of a record of the seals on the car doors, etc. From this it is insisted that while he was engaged in that character of work and until he had returned to the office of the company from such work with respect to the train in question, he was employed in interstate commerce. The cases of St. L. S. F. & T. Ry. vs. Seale, 229 U. S. 156; N. C. R. Co. vs. Zachary, 232 U. S. 248, are cited upon the question. In our opinion the evidence did not raise the issue. Neither of the cases cited can be held to reach this case. In the first, Seale, whose duties were similar to those of Rosenbloom, was proceeding at the time of his injury through the yard of the railway company to one of its tracks
357 to meet an incoming train engaged in the movement of interstate freight, for the purpose of obtaining the numbers of the cars and otherwise performing his duties in respect to them, and he was held to have been engaged directly in a duty connected with the movement of interstate freight. In the other case it was held that an employe's act in preparing an engine for a trip to move freight in interstate commerce was the act of one engaged in interstate commerce, and that he was still on duty and employed in such commerce in temporarily leaving his engine and going to his boarding house preparatory to departing upon his run with the engine. It was not shown here that Rosenbloom had been engaged in any service connected with the interstate freight train, and in the state of the evidence his walking through the yard cannot be said to have had any association with a duty in respect to it. The finding of the Court of Civil Appeals is definite to the effect that the evidence did not disclose for what purpose he was walking through the yard, or what character of work he had been engaged in just before his injury. The distinction, therefore, between the present case and those cited is obvious.

The motion for rehearing is accordingly overruled.

NELSON PHILLIPS,
Chief Justice.

Opinion delivered June 26th, 1915.

(Endorsed:) Mo. No. 3390. No. 2364. Pecos & N. T. Ry. Co. vs. Mrs. M. A. Rosenbloom, et al. Opinion on Motion for Rehearing Overruled with Corrections. Filed in Supreme Court, June 26, 1915. F. T. Connerly, Clerk. Mr. Justice Phillips.

358 *Order Overruling Motion for Rehearing.*

June 26th, 1915.

Motion No. 3390. No. 2364.

PECOS & NORTHERN TEXAS RY. CO.
vs.
Mrs. M. A. ROSENBLOOM et al.

From Potter County, Seventh District.

This day came on to be heard the motion of Pecos & Northern Texas Ry. Co. for a rehearing and the same having been duly considered, it is ordered that said motion be overruled, that the plaintiff in error, Pecos & Northern Texas Ry. Co. and its sureties, Ray Wheatley and Chas. A. Fisk, pay all costs incurred on this motion. Written opinion by Chief Justice Phillips.

359 *Petition for Allowance of Writ of Error.*

Filed in Supreme Court of Texas, August 12th, 1915.

In the Supreme Court of the United States.

PECOS & NORTHERN TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
Mrs. M. A. ROSENBLOOM et al., Defendants in Error.

Petition for Allowance of Writ of Error.

To the Honorable the Supreme Court of the United States:

Now comes the Pecos and Northern Texas Railway Company, by its Attorneys, J. W. Terry, Alex. S. Britton and A. H. Culwell, and complains that in the record and proceedings as also in the rendition of a judgment in a suit between Mrs. M. A. Rosenbloom, for herself as surviving wife and as next friend for Milton Rosenbloom and Matilda Rosenbloom, as surviving minor children, and in behalf of Isaac and Minnie Rosenbloom, as surviving father and mother of M. A. Rosenbloom, deceased, and the Pecos & Northern Texas Railway Company, in the Supreme Court of the State
360 of Texas, being the highest court of law or equity in said State to which the said plaintiff in error could appeal and obtain a decision on the merits of the issues involved in said cause, and same being the court which has the final custody of the record in said cause, and that final judgment having been rendered against the said plaintiff in error by the said Supreme Court of the State of Texas on the 10th day of February, 1915, and in which plaintiff in error's motion for rehearing was overruled on the 26th day of June, 1915.

That in said cause a title, right, privilege or immunity is claimed under a statute of the United States, to-wit, under the act of Congress of April 22nd, 1908, Chapter 149 35 Stat. L. 65, and known as the Federal Employers' Liability Act, and the decision is and had been against the title, right, privilege or immunity so especially set up and claimed under such statute of the United States, and the Supreme Court of the State of Texas having affirmed the judgment of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, whereby the judgment entered in the District Court of Potter County, Texas, against your petitioner and in favor of defendant in error in the total sum of $7,600.00 and costs was affirmed, and which said judgment is now a final judgment, and from which there is no appeal to any other court or courts within the State of Texas.

That plaintiff in error denied in the Supreme Court of the State of Texas, as well as in the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas, and in the District Court of Potter County, Texas, the right of defendants in error to maintain this action, and in each of said courts by proper pleas and
361 assignment- of error plead the above mentioned act of Congress, known as the Federal Employers' Liability Act, in bar of any recovery herein, and alleged that the rights and liabilities of the parties hereto are and were controlled by said Act of Congress, and that thereunder there was no right of action or recovery in behalf of defendants in error, which said pleas and assignments of error were by each of said court- overruled, and thereby a title, right, privilege or immunity claimed under a statute of the United States has been and was denied to your petitioner, all of which appears in the record and proceedings of said suit; manifest error hath happened to the great damage of the said Pecos and Northern Texas Railway Company.

Wherefore the said Pecos and Northern Texas Railway Company, by its attorneys, prays the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. W. TERRY.
ALEX S. BRITTON.
A. H. CULWELL.

Allowed by:

JOSEPH R. LAMAR.
Associate Justice of the Supreme Court of the United States.

(Endorsed:) P. & N. T. Ry. Co., P'tff in Error, vs. Mrs.
362 M. A. Rosenbloom, et al., Def'ts in Error. Petition for Allowance of Writ of Error. Filed in the Supreme Court of Texas, the 12th day of August, A. D. 1915. F. T. Connerly, Clerk Supreme Court.

363 *Bond.*

Filed in the Supreme Court of Texas August 12th, 1915.

In the Supreme Court of the United States.

THE PECOS AND NORTHERN TEXAS RAILWAY COMPANY, Plaintiff in Error,

vs.

Mrs. M. A. ROSENBLOOM et al., Defendants in Error.

Know all men by these presents: That we, The Pecos and Northern Texas Railway Company as principal, and Sealy Hutchings and H. O. Stein as sureties, are held and firmly bound unto Mrs. M. A. Rosenbloom for herself individually, and in behalf of Milton Rosenbloom and Matilda Rosenbloom, as surviving minor children, and for Isaac and Minnie Rosenbloom, as the surviving father and mother of M. A. Rosenbloom, deceased, in the full and just sum of Sixteen Thousand Dollars ($16,000.00) to be paid to the said Mrs. M. A. Rosenbloom for herself individually and in behalf of Milton Rosenbloom and Maltida Rosenbloom, as surviving minor children, and for Isaac and Minnie Rosenbloom, as the surviving father and mother of M. A. Rosenbloom, deceased, for which payment well and truly to be made we bind ourselves, our heirs, executors, and
364 administrators jointly and severally by these presents.

Whereas, lately in the Supreme Court of the State of Texas in a suit pending in said court, wherein The Pecos and Northern Texas Railway Company was plaintiff in error, and Mrs. M. A. Rosenbloom, for herself individually, and in behalf of Milton Rosenbloom and Maltida Rosenbloom, as surviving minor children, and for Isaac and Minnie Rosenbloom, as the surviving father and mother of M. A. Rosenbloom, deceased, were defendants in error, a judgment was rendered against the said plaintiff in error The Pecos and Northern Texas Railway Company in the total sum of Seven Thousand Dollars ($7,000.00), besides interest and costs of suit, and the said Pecos and Northern Texas Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and the citation directed to the said Mrs. M. A. Rosenbloom, for herself individually and in behalf of Milton Rosenbloom and Matilda Rosenbloom, as surviving minor children, and for Isaac and Minnie Rosenbloom, as surviving father and mother of M. A. Rosenbloom, deceased, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington thirty days from the date hereof;

Now, the condition of the above obligation is such, that — the said Pecos and Northern Texas Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fails to make

its plea good, then the above obligation to be void, else to remain in full force and effect.

THE PECOS AND NORTHERN TEXAS RAILWAY COMPANY,
By TERRY, CAVIN & MILLS, *Its Solicitors.*
365 SEALY HUTCHINGS,
H. O. STEIN,
Sureties.

Writ to operate as a supersedeas.

Allowed by:
JOSEPH R. LAMAR,
Associate Justice Supreme Court of the United States.

THE STATE OF TEXAS,
County of Galveston:

I, Sealy Hutchings, do solemnly swear that I am worth in my own right at least the sum of Sixteen Thousand Dollars ($16,000.00), after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Sixteen Thousand Dollars ($16,000.00).

SEALY HUTCHINGS.

Subscribed and sworn to before me this 6th day of July, 1915.

[SEAL.] CHAS. B. ABBOTT,
Notary Public in and for Galveston County, Texas.

366 THE STATE OF TEXAS,
County of Galveston:

I, H. O. Stein, do solemnly swear that I am worth in my own right at least the sum of Sixteen Thousand Dollars ($16,000.00), after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Sixteen Thousand Dollars ($16,000.00).

H. O. STEIN.

Subscribed and sworn to before me this 6th day of July, 1915.

[SEAL.] CHAS. E. ABBOTT,
Notary Public in and for Galveston County, Texas.

(Endorsed:) P. A. N. T. Ry. Co., P't'ff in Error, vs. Mrs. M. A. Rosenbloom, et al., Def'ts in Error. Bond. Filed in Supreme Court of Texas the 12th day of August, A. D. 1915. F. T. Connerly, Clerk Supreme Court.

367 *Assignments of Error.*

Filed in the Supreme Court of the State of Texas August 12th, 1915.

In the Supreme Court of the United States.

THE PECOS AND NORTHERN TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
Mrs. M. A. ROSENBLOOM et al., Defendants in Error.

Assignments of Error.

Comes now The Pecos and Northern Texas Railway Company, plaintiff in error, by its Attorneys, J. W. Terry, Alex. S. Britton, and A. H. Culwell, and says that in the record and proceedings aforesaid there is manifest error in the judgment and decisions of the Supreme Court of the State of Texas, to-wit:

First. The Supreme Court of the State of Texas erred in holding that under the facts of this case there was a right of action in favor of the defendants in error against the plaintiff in error, the facts showing as they do that plaintiff in error was a railroad engaged in interstate commerce, and that deceased as its employee likewise engaged in handling interstate commerce at the time of the accident in question. In such circumstances the right of action is only in a personal representative and same is not in the beneficiaries.

368 Second. Under the facts of this case the rights and liabilities of the parties are controlled by the Act of Congress of April 22nd, 1908, the same being Chapter 149, 35th U. S. Statute, L. 65, and commonly known as the Federal Employer's Liability Act, the facts showing as they do that plaintiff in error Railway Company was engaged in interstate commerce at the time of the accident in question and that deceased as its employee was likewise so engaged, and the Supreme Court of Texas erred in affirming the judgment against plaintiff in error, thereby holding that the beneficiaries defendants in error therein could maintain this action, the same being an action resulting in death.

Third. The Supreme Court of the State of Texas erred in affirming the ruling of the Court of Civil Appeals to the effect "that there was no evidence before the court upon which they could say that Rosenbloom was engaged in interstate commerce at the time even if it be held that the work he was doing would constitute interstate commerce, provided there were any cars in the train which were carrying interstate freight." Such holding was erroneous because the evidence shows and both the Court of Civil Appeals and the Supreme Court found as a matter of fact that Rosenbloom was en-

gaged in checking a certain train, taking the car numbers and initials, making a record of the seals on the car doors, etc., and the undisputed testimony shows conclusively and the Court of Civil Appeals (which has final jurisdiction on questions of fact under the practice in Texas) found as a matter of fact that such train was moving and carrying freight interstate "from Amarillo, Texas to Waynoka, Oklahoma," so that as a matter of law Rosenbloom was en-
369 gaged in interstate commerce and the Federal Employers' Act of Congress of June 22nd, 1908, governs to the exclusion of the State statute and as this suit was not maintained as required thereunder the judgments of the trial court and of the Court of Civil Appeals should have been reversed by the State Supreme Court and the cause dismissed.

Fourth. The Supreme Court of Texas erred in holding that the trial court committed no error in failing and refusing to give defendant's special charge No. 13 to the jury, which said charge was as follows:

"If M. A. Rosenbloom, at the time of his death, was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part, and a customary work reasonably carried on by defendant as a part of its business transporting freight interstate over its lines or if he had then just completed such inspection or said train and had not yet completed his record and placed in its place where usually kept, then you will return a verdict for defendant on its special plea that plaintiff had no right to maintain this suit in the capacity in which she sues."

and in affirming the judgment entered by the Court of Civil Appeals herein, whereby said Court of Civil Appeals held that there was no error in failing and refusing to submit the issue presented by said special charge to the jury.

Fifth. The Act of Congress of April 22nd, 1908, same being Chapter 149, 35th U. S. Statute, L. 65, and commonly known as the Federal Employers' Liability Act, imposed a liability for injuries resulting in death in derogation of the common law, and providing as it does that in all actions founded thereon the damages recoverable shall be diminished in proportion to the amount of negligence attributable to the deceased employee, the defendant Company
370 is not deprived of the right to plead and have the negligence of such deceased employee considered to lessen the amount of recovery by reason of discovered peril being the only issue of liability submitted to the jury by the trial court, and the Supreme Court of Texas erred in holding that under the facts of this case there was no issue of contributory negligence to be submitted because the issue of discovered peril was the only one to be determined by the jury.

Respectfully submitted,

J. W. TERRY,
ALEX S. BRITTON,
A. H. CULWELL,
Attorneys for Plaintiff in Error,
The Pecos and Northern Texas Railway Company.

(Endorsed:) P. & N. T. Ry. Co., P't'ff in Error, vs. M. A. Rosenbloom et al., Def't in Error. Assignment of Error. Filed in the Supreme Court of Texas the 12th day of August, A. D. 1915. F. T. Connerly, Clerk Supreme Court.

371 CLERK'S OFFICE,
Supreme Court of Texas:

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing three hundred and seventy pages contain a true and correct copy of the transcript of the record of the proceedings had in the District Court of Potter County, Texas; in the Court of Civil Appeals of the Seventh Supreme Judicial District at Amarillo, Texas, and in the Supreme Court of Texas, as the same appear of record and on file in my office in cause No. 2364, Pecos & Northern Texas Railway Company, Plaintiff in Error, vs. Mrs. M. A. Rosenbloom, et al., Defendants in Error.

Witness my hand and the seal of said Court at the City of Austin, this the 14th day of August, A. D. 1915.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk Supreme Court.

372 In the Supreme Court of the United States.

THE PECOS AND NORTHERN TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
Mrs. M. A. ROSENBLOOM et al., Defendants in Error.

UNITED STATES OF AMERICA:

To Mrs. M. A. Rosenbloom for herself and in behalf of Milton Rosenbloom and Matilda Rosenbloom, surviving minor children, and for Isaac and Minnie Rosenbloom, surviving father and mother of M. A. Rosenbloom, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within Thirty (30) days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Texas at Austin, Texas, wherein the Pecos and Northern Texas Railway Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable —— ——, Associate Justice of the Supreme Court of the United States this 3 day of Aug., 1915.

JOSEPH R. LAMAR,
Associate Justice of the Supreme Court of the United States.

373 On this 10th day of August in the Year of Our Lord One Thousand Nine Hundred and Fifteen personally appeared Lee Jenkins, Deputy, Sheriff of McLennan County, Texas, before me, a Notary Public in and for McLennan County, Texas, and makes oath that he delivered a true copy of the within citation to J. A. Stanford, who is the Attorney of Record of the within named Mrs. M. A. Rosenbloom in her own behalf and in behalf of Milton Rosenbloom and Matilda Rosenbloom, surviving minor children, and Isaac and Minnie Rosenbloom, surviving mother and father of M. A. Rosenbloom, deceased, Defendants in Error.

S. S. FLEMING,
Sheriff of McLennan County, Texas.
By LEE JENKINS.

Sworn to and subscribed before me this, the 10th day of Aug., 1915, by the said Lee Jenkins, affiant.

[Seal Notary Public, County of McLennan, Texas.]

NAT HARRIS,
Notary Public in and for the County of McLennan, Texas.

373½ [Endorsed:] P. & N. T. Ry. Co., Pl'ff in Error, vs. Mrs. M. A. Rosenbloom et al., Def'ts in Error. Citation.

374 In the Supreme Court of the United States.

PECOS AND NORTHERN TEXAS RAILWAY COMPANY, Plaintiff in Error,
vs.
Mrs. M. A. ROSENBLOOM et al., Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

President of the United States to the Honorable the Supreme Court of the State of Texas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Texas before you, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit between the Pecos and Northern Texas Railway Company, Plaintiff in Error, and Mrs. M. A. Rosenbloom in her own behalf and for the use and benefit of Milton Rosenbloom and Matilda Rosenbloom, surviving minor children, and Isaac and Minnie Rosenbloom, surviving mother and father of M. A. Rosenbloom, deceased, defendants in error, wherein a right, title, privilege or immunity is claimed by plaintiff in error under a statute of the United States, to-wit, the Act of Congress of April 22nd, 1908, Chapter 149, 35th Stat. L. 65, and commonly known as the Federal Employers' Liability Act, and the decision is and has been against the title, right, privilege or im-

munity so especially set up and claimed by said plaintiff in error; and manifest error hath happened to the great damage of the said Pecos and Northern Texas Railway Company as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein
375 given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same at Washington within Thirty (30) days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States the 5th day of Aug., in the Year of Our Lord One Thousand Nine Hundred and Fifteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Writ to operate as a supersedeas on giving appeal bond Aug. 3, 1915.

JOSEPH R. LAMAR,
A. J. S. C. U. S.

Allowed by:
JOSEPH R. LAMAR,
Associate Justice of the Supreme Court of the United States.

It is hereby certified that a copy of this writ is this day lodged in the Clerk's office for the use of the defendant in error this the 12th day of Aug., A. D. 1915.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk of the Supreme Court of Texas.

376 [Endorsed:] P. & N. T. Ry. Co., Pl'ff in Error, vs. Mrs. M. A. Rosenbloom et al., Def'ts in Error. Original Writ of Error.

Endorsed on cover: File No. 24,896. Texas Supreme Court. Term No. 613. Pecos & Northern Texas Railway Company, plaintiff in error, vs. Mrs. M. A. Rosenbloom, for herself and in behalf of Milton Rosenbloom et al. Filed August 28th, 1915. File No. 24,896.

No. 613.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

PECOS AND NORTHERN TEXAS RAILWAY COMPANY,
Plaintiff in Error,

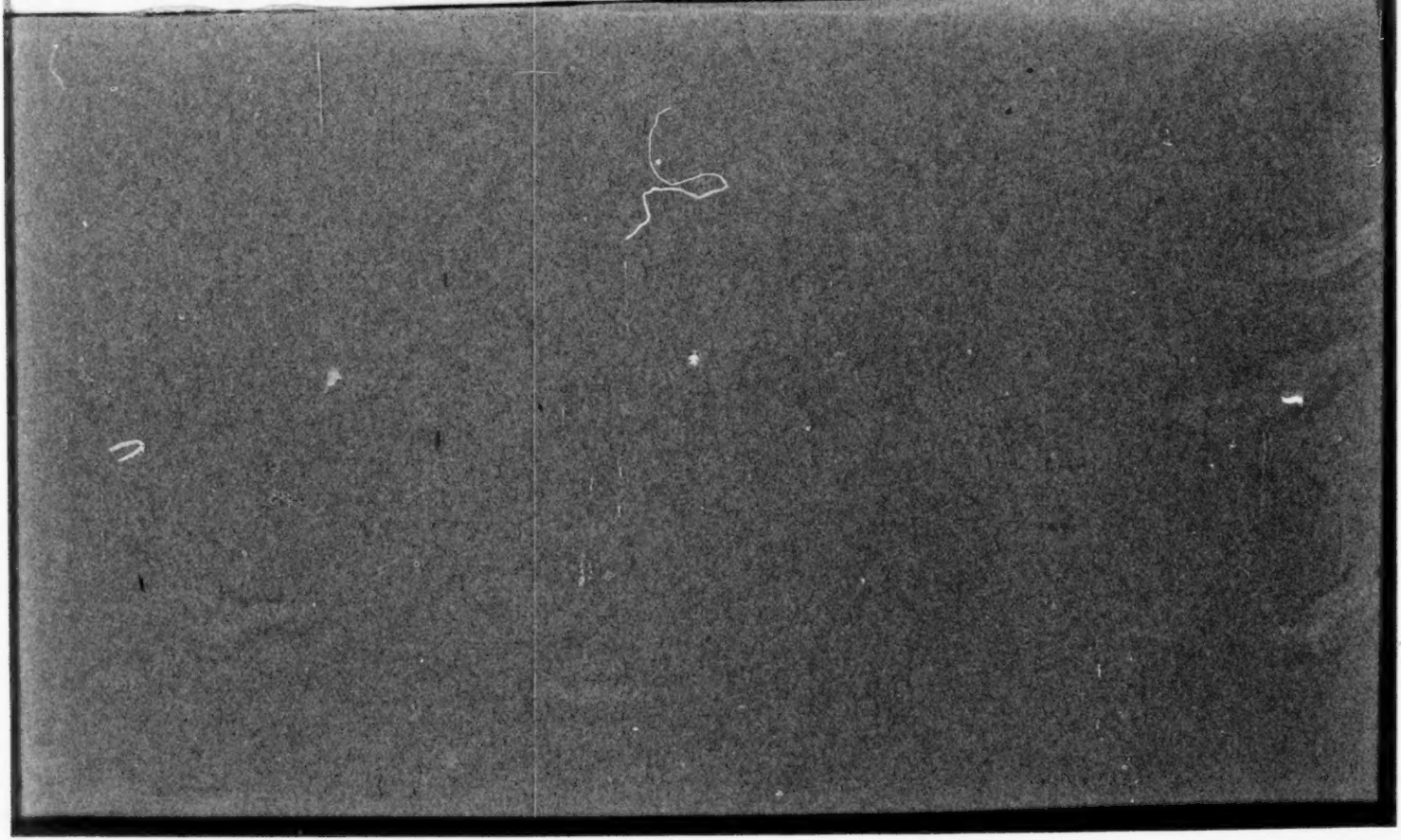
vs.

MRS. M. A. ROSENBLOOM, ET AL.,
Defendants in Error.

File No. 24,886.

MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM.

H. M. Dunn, of Houston,
J. A. Patterson, of Waco,
Attorneys for Defendants in Error,
Mrs. M. A. Rosenbloom, et al.



No. 613.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1915.

PECOS AND NORTHERN TEXAS RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. M. A. ROSENBLOOM, FOR HERSELF AND IN BEHALF OF MILTON ROSENBLOOM, ET AL.,
Defendants in Error.

File No. 24,896.

To The Honorable, The Supreme Court of the United States.

Now come the defendants in error, by their attorneys, J. A. Stanford and H. H. Cooper, and respectfully show to the Court that this Honorable Court is without jurisdiction to hear and determine any matters involved in this cause, and that the writ of error granted herein should be dismissed or the judgment of the State court affirmed, with damages, in either event, for the following reasons, to-wit:

FIRST.

Because no Federal question was, or is, involved in the case as made by the evidence.

STATEMENT.

Plaintiff in error plead as a defense that at the time M. A. Rosenbloom was killed that it was engaged in interstate commerce, and that Rosenbloom, its employe, at said time was likewise engaged in service for it in furtherance of its interstate business, and that, therefore, the cause of action for his death was controlled by the Act of Congress of April 22, 1908, Chapter 149, 35 Stat. L. 65, and known as the Federal Employers Liability Act, and that the suit could be prosecuted only by a legal representative.

Plaintiff in error admits that before the Federal statute could have any application it was incumbent upon it to show, not only that it was engaged in interstate commerce, but that Rosenbloom, at the time he was killed, was also engaged in the performance of interstate service, and to support its contention takes the position that at the time Rosenbloom was killed he was walking beside a long freight train which was leaving the yards carrying interstate freight, and that Rosenbloom was getting the numbers, etc., of the cars in this freight train, and so performing service in connection with said interstate freight, and in its third assignment plaintiff in error makes the assertion, "Such holding was erroneous because the evidence shows, and both the Court of Civil Appeals and the Supreme Court found as a matter of fact, that Rosenbloom was engaged in checking a certain train, taking the car numbers and initials, making a record of the seals on the cars, etc."

The above statement has no support whatever in the record. On this point the Court of Civil Appeals made the following finding of fact: "(9) At the time of the death of Rosenbloom there was a long freight train,

about thirty-four cars, leaving from track No. 4 in these middle yards to go out at the north end of the line and thence on to Wynoka, Okla., interstate, over the line of the Southern Kansas Railway Company. Such train was made up of cars which had come in from New Mexico over appellant's line, and was going out over the Southern Kansas to points in Oklahoma, Kansas, Missouri, Illinois and other States, except one car, which was well-drilling tools, consigned to Panhandle, a point in Carson County, Texas, which would be reached without leaving the State, and which car of tools had originated at Amarillo, Texas, to be used in work on the company's water station at Panhandle.

"(10) While such train was moving out slowly from said track, Rosenbloom was going down between tracks 4 and 5 by the side of said outgoing train, from south to north, *for what purpose is not shown by the testimony, nor is it shown what he had immediately preceding his being killed been doing.*

"(11) As such outgoing train and Rosenbloom were so moving one of the day switch-cars having coupled an engine onto the south end of a ballast car, somewhere to the south of where Rosenbloom was, came north (same direction as the outgoing train and Rosenbloom were moving) on track 5, intending to go a few car lengths beyond where they struck Rosenbloom, and there couple onto some coal cars and pull them back south on track 5. The crew handling this switch engine and ballast car were not engaged in interstate commerce at the time Rosenbloom was killed.

"(12) As this switch engine and ballast car were about to pass Rosenbloom, from some cause and by some means which are in dispute, he got in front of the ballast car, was knocked down, run over and killed." (See para-

graphs 9, 10, 11 and 12 of findings of fact by the Court of Civil Appeals, 141 S. W. R., 178-179.)

On this same point the Supreme Court of Texas said: "It was not shown here that Rosenbloom had been engaged in any service connected with the interstate freight train and, in the state of the evidence, his walking through the yard can not be said to have had any association with a duty in respect to it. The finding of the Court of Civil Appeals is definite to the effect that the evidence did not disclose for what purpose he was walking through the yards, or what character of work he had been engaged in just before his injury." (See latter part of opinion of Supreme Court on motion for rehearing, 177 S. W. R., 952.)

The above findings of fact by the Court of Civil Appeals and the Supreme Court is supported by all the evidence without any conflict. In fact, the evidence of the engineer Walker and brakeman Haney showed affirmatively that he was not engaged in the performance of any service in connection with the outgoing freight train. (See statement of fact, p. , line . Also p. , line .)

There is no evidence whatever in the record that tends to show that Rosenbloom was engaged in interstate commerce at the time he was killed. In fact, there is no evidence in the record that he was performing any kind of service or had performed any service of any kind the day he was killed.

SECOND.

Because the contention of plaintiff in error that the Federal statute was applicable, being predicated solely upon the fact that the long freight train was leaving the yards carrying cars and freight interstate, and the sup-

posed fact that Rosenbloom at the time he was killed was engaged in the performance of service in connection with this train, and the Court of Civil Appeals and the Supreme Court of Texas having found that there was no evidence that Rosenbloom was performing any service whatever in connection with said freight train, and said finding of fact being supported by all the evidence, and binding upon this Honorable Court, no Federal question is raised and this Honorable Court has no jurisdiction.

STATEMENT.

Under our Texas practice the findings of fact by our Court of Civil Appeals is binding upon our Supreme Court. Our Court of Civil Appeals found, in substance, that Rosenbloom's duties as yard clerk required him to perform service on both interstate and intrastate cars, so his duties required him to perform both characters of service. The court further found that at the time Rosenbloom was killed a freight train was leaving the yards on track No. 4 and that all the cars in said train were interstate except one, and that Rosenbloom was walking between tracks Nos. 4 and 5, opposite said freight train, going in the same direction, for what purpose was not shown by the evidence, nor was it shown what he had been doing immediately preceding his being killed. That Rosenbloom while walking between said tracks as above indicated, by some means in dispute, got on track No. 5 and was knocked down and killed by a switch engine on track No. 5 going in the same direction as the freight (see findings of fact by Court of Civil Appeals), and on the points covered by these findings there is no conflict in the evidence, said findings being supported by all the evidence. Our Supreme Court, speaking through Chief

Justice Brown just a short time prior to his death and at a time when from old age and disease he doubtless was greatly hampered in his work, undertook to make "a condensed statement of the findings of the Court of Civil Appeals." And in this "condensed statement" it was said, in substance, that the freight train was standing on the main track, and that there were no interstate cars in it, and that Rosenbloom was engaged at his work on said train, etc., said "condensed statement" being just the opposite to what the Court of Civil Appeals did find (see opinion by C. J. Brown, of date February 10, 1915, 173 S. W., p. 215). When the attention of our Supreme Court was called to the errors in this condensed statement of the findings of fact by the Court of Civil Appeals our Supreme Court corrected its statement of the case so as to conform to the findings of fact made by the Court of Civil Appeals (see opinion of Supreme Court on motion for rehearing, dated June 26, 1915, 177 S. W., 952). But plaintiff in error bases its assignment, and especially its third assignment, and doubtless its petition for writ of error, on these erroneous statements in the first opinion of the Supreme Court as to what were the findings of the Court of Civil Appeals, and thereby procured the granting of this writ of error. Under the well settled law of this Court, as applied to the findings of fact by the Court of Civil Appeals (141 S. W., 178), and as confirmed by our Supreme Court in its last opinion, of date June 26, 1915 (177 S. W., 952), and which is raised as to the applicability of the Employers Liability Act, and this Honorable Court has no jurisdiction.

THIRD.

Because, if any Federal question is involved in this

case, it is only one in form made by pleading, but not by any evidence, and is so wholly devoid of merit and has been so explicitly foreclosed by the decisions of this Court as to leave no room for real controversy in the matter. To warrant this Court in assuming jurisdiction of a case the Federal question asserted to be involved therein must be "a real, substantial question."

FOURTH.

Because, although the record may in form present a Federal question, yet the motion should be allowed to dismiss where it plainly appears, as in this case, that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit, and therefore frivolous.

FIFTH.

Because the asserted Federal question is so lacking in merit and devoid of any support in the evidence as to be frivolous, and this Honorable Court should either dismiss or affirm the judgment of the State court, with damages, without further consideration.

STATEMENT.

The evidence bearing upon the issue here involved is very brief and is without any conflict, and is fully embraced in the findings of fact by the Court of Civil Appeals, and such findings bearing upon the issue here, which are admitted to be correct, are. That Rosenbloom's duties as yard clerk required him to perform service in the yards on both interstate and intrastate cars. That at the time he was killed a freight train carrying interstate cars was leaving said yards on track

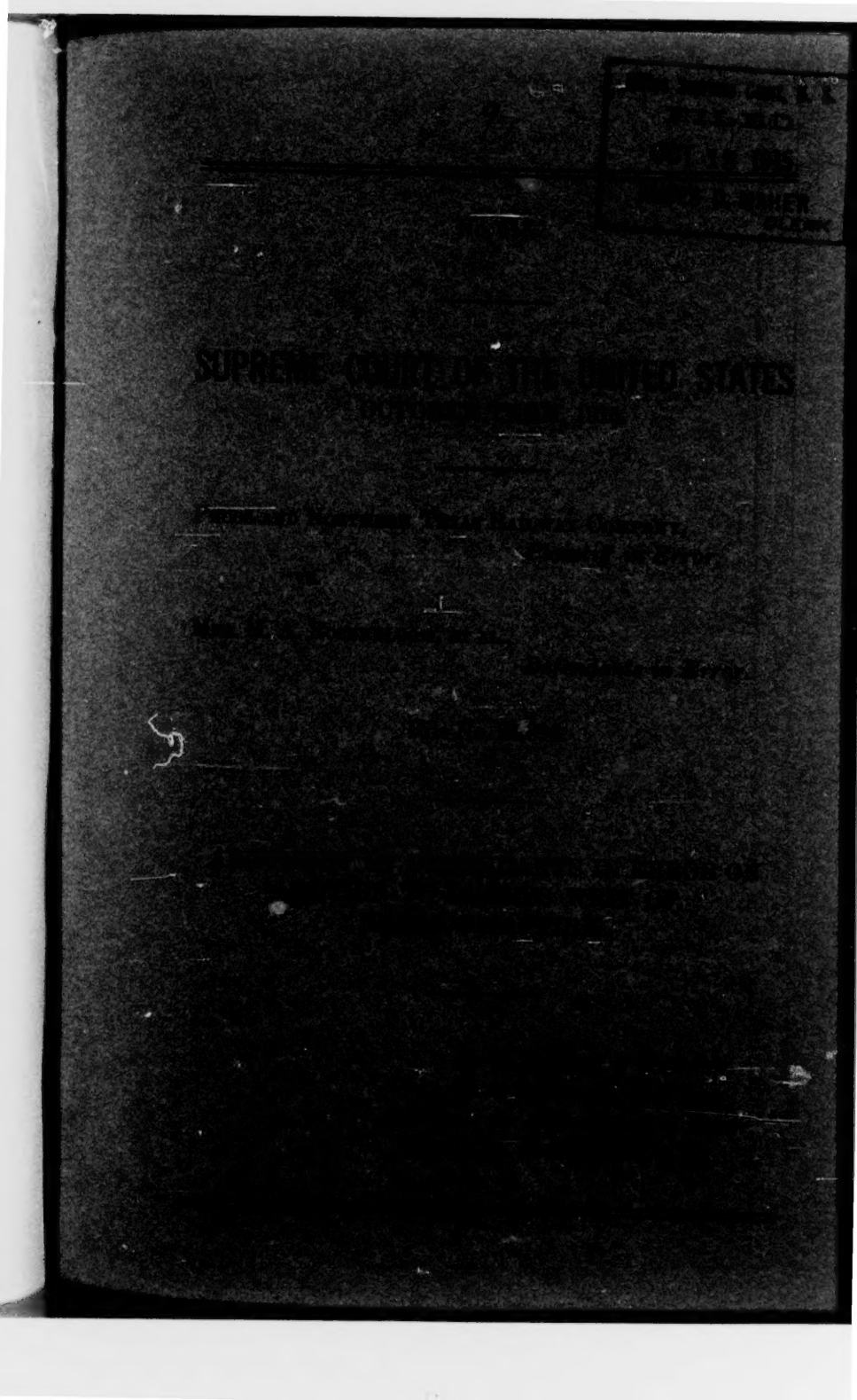
No. 4 going out on its run, at the rate of eight to ten miles per hour. That Rosenbloom was walking through said yards, between tracks 4 and 5, going in the same direction as the freight, for what purpose was not shown by any evidence, nor what he had been doing just previously. While said freight was passing Rosenbloom a switch engine pushing a ballast car approached him from the rear, on track No. 5, and Rosenbloom by some means got on track No. 5 and was knocked down and killed. The fact of his walking through the yards adjacent to said outgoing freight is no evidence that he was performing any service in connection with said freight train. In fact the engineer and brakeman on the switch engine saw him for some time before they struck him, and they testified he was not looking at the outgoing freight. (See statement of facts, p. , line .) The test, as to whether Rosenbloom was engaged in interstate commerce or not, is in what character of work was he engaged at the time he was killed. (Illinois Cent. Ry. Co. v. Behrens, 233 U. S. Supreme Court Report, p. 471.)

There was no evidence tending to show that Rosenbloom was engaged in any service pertaining to interstate commerce at the time he was killed, or had been so engaged even during the day he was killed, and in the absence of such evidence no Federal question is raised.

Wherefore defendants in error pray that writ of error herein be dismissed, or that said cause be affirmed, without further consideration, with damages.

J. A. Stanford,
W. V. Cocke
Attorneys for Defendants in Error,
Mrs. M. A. Rosenbloom, et al.

James D. Williamson
Of Counsel



No. 613.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1915.

PECOS AND NORTHERN TEXAS RAILWAY COMPANY,
Plaintiff in Error,

vs.

MRS. M. A. ROSENBLOOM, ET AL.,
Defendants in Error.

File No. 24,896.

BRIEF AND ARGUMENT BY DEFENDANTS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR, OR AFFIRM.

Plaintiff in error having plead that it and its employe, M. A. Rosenbloom, were both engaged in interstate commerce at the time he was killed, the burden of proving such special defense was upon plaintiff in error.

Art. 2299, Sayles' Texas Civil Statutes.
Rule 12, Common Law Rules of Evidence under above statute.

The above proposition is elementary under the Texas practice.

Whether Rosenbloom was engaged in interstate com-

merce or not, is determined by the character of work he was doing at the time he was killed.

> Illinois Central Ry. Co. v. Behrens, 233 U. S. Report, pp. 471-473, and cases there cited.
> Van Brimmer v. Texas & P. Ry. Co. (Ed. Tex., 1911), 190 Fed., 394.
> See also "III. Employe Engaged in Interstate Commerce," Fed. Statutes Annotated, Supplement 1914, p. 823, and cases there cited.

On writ of error to the highest court of a State, nothing is removed for re-examination in this Court but questions of law arising upon the record; and the findings of fact made by the Supreme Court of the State will be the basis of the decision of this Court.

> Thayer v. Spratt, 189 U. S., 346.
> Telluride Power Trs. Co. v. Rio Grande Western Ry. Co., 175 U. S., 639.
> Wood v. Chesborough, 228 U. S., 672.
> Waters Pierce Oil Co. v. Texas, 212 U. S., 86.
> Chrisman v. Miller, 197 U. S., 313.

If no Federal question were presented by the evidence for decision in the State court, then the writ of error should be dismissed.

> Wabash Ry. Co. v. Haynes, U. S. 58, L. Ed. 1227.
> Vandalia R. Co. v. Indiana, 207 U. S., 359.
> Hedrick v. A. T. & S. F. Ry. Co., U. S. 42, L. Ed. 321.
> Missouri P. R. Co. v. Fitzgerald, 160 U. S., 556.
> Seaboard Air Line R. Co. v. Duval, 225 U. S., 477.

George D. Creary v. John Devlin, 92 U. S., —; 23 L. Ed., 510).

Brown v. Atwell, 92 U. S., 311; 23 L. Ed., 511.

Missouri, Kansas & Texas R. Co. v. West, U. S. 58; L. Ed. 801.

The Court of Civil Appeals found that plaintiff in error was engaged in both interstate commerce and intrastate commerce, and that the freight train leaving the yards at the time of the injury was carrying cars and freight interstate, and they found that at the time Rosenbloom was killed he was walking through the yards adjacent to this freight train, going in the same direction, but for what purpose was not shown by the evidence, and it was not shown what he had been doing just before he was killed. (See paragraph 10, findings of fact by Court of Civil Appeals, 141 S. W., 179.) On the same point our Supreme Court said: "It was not shown here that Rosenbloom had been engaged in any service connected with the interstate freight train, and in the state of the evidence his walking through the yards can not be said to have had any association with a duty in respect to it. (177 S. W., 952.) The finding of the Court of Civil Appeals is definite to the effect that the evidence did not disclose for what purpose he was walking through the yards, or what character of work he had been engaged in just before his injury." (See opinion of Supreme Court on motion for rehearing, dated June 26, 1915; 177 S. W., 952.)

The above findings of fact by the Court of Civil Appeals and the Supreme Court of Texas is not only supported by the evidence but is established by all the evidence without any conflict whatever. In fact, everyone who saw Rosenbloom, at the time he was killed and just

before, testified, and no one testified to seeing him performing any kind of service in connection with the interstate freight. J. L. Walker, the engineer of the switch engine that ran over Rosenbloom, said he was not looking at the outgoing freight. Under our Texas practice, as said by plaintiff in error, the findings of fact by the Court of Civil Appeals, is binding upon our Supreme Court, and it is also true that the findings of fact by our Court of Civil Appeals and Supreme Court, when supported by the evidence, will be accepted as conclusive as to the facts by this Honorable Court. Before any question, as to the applicability of the Federal statute, could be said to be raised it was incumbent upon plaintiff in error not only to show that it was engaged in interstate commerce, but that Rosenbloom at the time he was killed, was also so engaged. And under the findings of fact as shown by both the Court of Civil Appeals and the Supreme Court of Texas, which are supported by all the evidence, there is no evidence that Rosenbloom was so engaged. There being an entire want of evidence to show he was so engaged and no fact found that would even tend to show that he was engaged in any service in connection with interstate commerce, no question as to the applicability of said Federal Statute was raised and so no Federal question was raised or involved in this case, and the writ of error should be dismissed. Plaintiff in error has not, in any of its numerous briefs and arguments filed herein, attempted to point out a syllable of evidence that would tend to show that Rosenbloom was engaged in the performance of any service whatever in connection with the interstate freight, or that he was engaged in the performance of service of any kind, but plaintiff in error does point out the fact that defendants in error alleged in their petition on which the case was tried that Rosen-

bloom was engaged in service in connection with the outgoing freight, and content themselves by calling attention to this allegation as though it was evidence. It is true defendants in error did make the allegation, but it is equally true that plaintiff in error denied such allegation, as shown by its general denial, and if both had been introduced in evidence one would have had just as much probative force as the other. If the pleading of defendants in error containing this allegation had been offered in evidence, under the circumstances of this case, it could have had no weight; Rosenbloom was killed instantly, no one got any information from him as to what he was doing; his wife and children were not present. Everyone who was present at the time he was killed, or that saw him soon before, testified fully in the case, and no one saw him doing any service or act in connection with the outgoing freight train. So it is evident that the allegations in the pleading of defendant in error as to what he was doing was the mere surmise of the pleader and was no more evidence of the truth of the matter pleaded than the denial of defendant in error was evidence that the matter pleaded was untrue; neither was evidence, but only pleading—a basis for the introduction of evidence. Defendants in error sought a recovery under our State statutes on principles of law sufficiently broad to warrant a recovery without the aid of the Federal statute, and the allegation referred to was mere surplusage—the evidence showing a case under the State law as pleaded. (See Wabash Ry. Co. v. Hayes, 234 U. S., 86.) The evidence was fully developed, all the train crew and everybody who saw Rosenbloom killed, or saw him while walking between the tracks before he was killed, testified fully in the case, and no one testified to seeing him performing any service whatever in connection with the outgoing

freight; on the other hand, the uncontroverted evidence is that he was not performing any service in connection with the outgoing train, as found by both our Court of Civil Appeals and Supreme Court. There is no conflict whatever in the evidence bearing upon the question here involved and, reduced to its last analysis, it is simply this: Rosenbloom's duties during the time he was employed in the yards required him to perform service on cars, some interstate and others intrastate, and under the Behrens case above cited, when he was engaged in performing service on an interstate car he was engaged in interstate commerce, and when giving his attention to an intrastate car he was engaged in intrastate commerce. If it had been shown that he was performing service on the outgoing freight, which was an interstate train, or that he was on his way to some interstate car for the purpose of performing service on same, then the case would come within the rule in the Seale case, but there is no such evidence in the record. There is no evidence whatever that he was performing any service on any interstate cars, or that he was on his way to any interstate car. In fact, there is no evidence he was on duty the day he was killed. As stated above, reduced to its final analysis, the evidence shows that Rosenbloom's duties in the yards required him to perform both characters of service, and at the time he was killed he was walking through the yards, without any evidence to show which character of service he was performing or whether he was performing any at all, or whether he was on duty or had been on duty the day he was killed. This was not sufficient to raise any question of the applicability of the Federal statute.

In the case of Deming v. Carlisle Packing Co., 226 U. S., 102, Chief Justice White of this Court uses the follow-

ing language: "It has come to be settled that on a motion to dismiss it is the duty of the court to consider whether an asserted Federal question is devoid of merit and unsubstantial, either because concluded by previous authority or because of its absolute frivolous nature, and if it is found to be of such character to allow a motion to dismiss. This being true, as a conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a Federal ground which is unsubstantial and frivolous, it follows that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decision of this court also leaves it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is unsubstantial and frivolous, the duty to affirm results."

The asserted Federal question in this case is only one in form, made by the pleading but not by any evidence. There being no Federal question raised by any evidence, this Honorable Court is without jurisdiction and should dismiss this writ of error. But if there were any color of a Federal question, evidently it is so unsubstantial and devoid of merit as to be frivolous and undeserving of further consideration.

Wherefore defendants in error pray that this writ of error be dismissed, or that the judgment of the State court be affirmed, with interest and damages, in either event.

H. H. Cooper, *of Houston,*
J. A. Stanford, *of Waco,*
Attorneys for Defendants in Error,
Mrs. M. A. Rosenbloom, et al.

James D. Williamson
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 813.

PECOS & NORTHERN TEXAS RAILWAY CO., PLAINTIFF IN ERROR,

vs.

MRS. M. A. ROSENBLOOM ET AL., DEFENDANTS IN ERROR.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

J. W. TERRY,
GARDINER LATHROP,
A. H. CULWELL,
ALEX. BRITTON,
EVANS BROWNE,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 613.

PECOS & NORTHERN TEXAS RAILWAY CO., PLAINTIFF IN ERROR,

vs.

MRS. M. A. ROSENBLOOM ET AL., DEFENDANTS IN ERROR.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Motion to dismiss the writ of error or affirm the Supreme Court of Texas has been made in this case on the theory either that no Federal question exists or that, if it does, it is manifestly frivolous and devoid of merit. No part of the record has been printed in support of the motion.

This motion, based as it is on the reasons above suggested, is made, notwithstanding the patent facts that plaintiff in error at the time the cause of action accrued was engaged in interstate commerce, and that the decedent, Rosenbloom, was

at the time of his death and for some time previous thereto had been in the employ of plaintiff in error as yard clerk; that his duties as yard clerk included an examination of incoming and outgoing trains, both interstate and intrastate, and the making of a record of numbers and initials of the cars, and the inspection of and recording of the seals of the car doors, etc.; that at the time of his death there was a long freight train, containing about thirty-four (34) cars, leaving from a track in the middle yards to go out at the north end on the main line and thence on to a point in Oklahoma, and that such train was made up of cars which had come in from New Mexico over the line of plaintiff in error, and were going out to points in Oklahoma, Kansas, Missouri, Illinois, and other States; that while said train was moving out slowly Rosenbloom was walking down between tracks four and five (the train moving out on track four) by the side of the train getting a record of the cars therein, and that while so engaged Rosenbloom was struck by a ballast car and yard engine and was killed (Opinion Court of Civil Appeals, Trans., pp. 212 *et seq.*).

The Court of Civil Appeals found (Trans., p. 220) that at the time of Rosenbloom's death this long freight train was moving out of the yards and was made up of cars which had come in from New Mexico and were going out to points in Oklahoma, Missouri, and elsewhere. This in and of itself was a finding that this particular train was engaged in interstate commerce.

Defendants in error and plaintiffs below in their third amended petition alleged, among other things (Trans., p. 4):

> "That while her said husband was engaged in said duties, said freight train was moving out on its regular run and was moving out along said switch track number four, and that her said husband was between said tracks numbers four and five, with his face toward the north, in the same direction in which said freight train was moving and was walking along by the side

> of said freight train for the purpose of observing and getting the numbers of the cars in said freight train while the same was pulling out."

Here was an unqualified admission that the deceased was "walking along by the side of said freight train for the purpose of observing and getting the numbers of the cars in said freight train while the same was pulling out." This averment and admission was before both of the lower courts. That it was an admission is manifest, and the characterization of it as "mere surmise of the pleader" by counsel for defendants in error can in no way change its effect as an admission. Having been admitted by the plaintiff, there was no need that it be proved by the defendant below, although in its favor. It is too well-settled law to admit of dispute that, without modification or qualification, an admission in pleading is binding on the party making it. Certainly it is a most novel proposition, as set forth by counsel for defendants in error, that this admission was but a "mere surmise of the pleader," in no way aided the defendant, and that, on the contrary, defendant was required to prove the fact so admitted. Nor will it do to say that the admission in the petition that Rosenbloom was engaged in service in connection with this outgoing freight train is removed from the case by reason of defendant's general denial, because the defendant in its amended answer specially plead as follows (Trans., p. 15):

> "At the time of the accident in question, this defendant, with its connecting carriers, were engaged in interstate commerce, carrying freight and passengers for hire over their respective lines of railroad, interstate, on through billings, and the freight train with which and around which the deceased, M. A. Rosenbloom, was at work, at and immediately prior to the time of his death, was a train loaded principally with freight, being transported interstate and being used in such interstate commerce; and the acts and duties of the said M. A. Rosenbloom, in connection therewith,

> were acts of interstate commerce, being done and performed by him as an employee by this defendant; and his acts were such as were necessary to a proper handling and transportation of said freights in said train."

The conclusion, therefore, reached by the Court of Civil Appeals and stated by it, that while this train was moving out from the yards Rosenbloom was going between certain tracks by the side of the train "for what purpose is not shown by the testimony, nor is it shown what he had, immediately preceding his being killed, been doing," is, we submit, plain error. Rosenbloom's purpose at the time and his employment at the time was specially averred in the petition, which anticipated defendants' plea, and hence no testimony was necessary in support of such averment.

Notwithstanding the opinions of the lower courts, each court had before it a record which disclosed the undisputed fact that Rosenbloom was employed by a railway company engaged in interstate commerce, as a car checker in its yards; that immediately preceding and at the time of his death he had been and was walking beside a track over which an interstate train was moving out of the yards; that the petition admitted his occupation in connection with this train, and defendant below in its answer alleged the same fact. Certainly the fact of his general employment as a car checker by an interstate carrier, his position beside a moving interstate freight train, the cars in which were numbered and initialed, coupled with the plaintiff's admission in the pleadings that Rosenbloom was engaged in service in connection with this same train, raised an issue of fact, to wit, his employment at the time of his death, which should have been submitted to the jury for proper determination by it as an issue of fact.

In the case of North Carolina Railway Company *vs.* Zachary, 232 U. S., 248, this court said, page 258:

> "Of course, if upon the evidence any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question."

In the Zachary case the question of fact which should have gone to the jury was whether or not on the evidence the decedent was actually employed in interstate commerce at the time of his death, and this court after analyzing the evidence "to the extent necessary to give plaintiff in error the benefit of its asserted Federal right," came to the clear conclusion that the deceased was still "on duty" and employed in interstate commerce, notwithstanding his temporary absence from the locomotive.

Precisely so in the present case, the deceased was "on duty" at the time of the accident. That fact is not questioned. His duty consisted in part of checking numbers and initials of cars in moving trains. He was beside such a train then moving in interstate commerce, at the time of the accident, and either was at the time or had immediately been engaged "in observing and getting the numbers of the cars in said train," yet the Texas courts both say that because there was no direct and positive statement in the evidence that Rosenbloom was actually checking the numbers and initials of these cars when he was killed, he was not shown to have been engaged in interstate commerce at the time of his death, thus ignoring the plain admission in the pleadings.

As said by this court in New York Central R. R. *vs.* Carr, 238 U. S., 260, page 263, referring to the Federal statute:

> "The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day railroad employees often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the State from interstate business. * * * But the matter is not

> to be decided by considering the physical position of the employee at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

Citing North Carolina Ry. Co. *vs.* Zachary, 232 U. S., 248, and St. Louis & San Francisco Railway Co. *vs.* Seale, 209 U. S., 156.

So in this case Rosenbloom's duties required him, in the course of their fulfillment, to check cars engaged in intrastate and interstate commerce. It is manifest that in order to check a moving train physical presence near that train is required. While it is true that the nature of Rosenbloom's employment cannot be decided by considering his physical position at the time of the injury alone, that position, we submit, coupled with the fact that it was adjacent to a moving interstate freight train, that he was on duty at the time and that his duty required him to make a record of the initials and numbers of the cars in such a train, and that he either was or had been getting the numbers of the cars in that train, as admitted by plaintiff below, certainly raised a substantial issue of fact for determination by the jury, and as such should have been submitted to the jury by the trial court. Pennsylvania Company *vs.* Donat, decided by this court on November 1, 1915.

We contend that the record shows conclusively the following essential facts:

1. The Pecos & Northern Texas Railway Company was an interstate carrier.

2. Rosenbloom was employed by the railway company as a yard clerk, and his duties consisted principally of checking the numbers and initials of cars moving in and out of the yards, both in intrastate and interstate commerce.

3. That at the time of Rosenbloom's death he was walking beside a train moving out of the yards and composed in part of cars received from a point outside of the State of Texas and moving to other points outside of that State.

4. That while this train was moving out of the yards Rosenbloom was walking along by the side of the train for the purpose of observing and getting the numbers of the cars in the train.

5. That while so engaged he was struck by a ballast car and yard engine and instantly killed.

These facts, we submit, bring this case within the decision of this court in St. Louis & San Francisco Railway Company *vs.* Seale, 209 U. S., 156. In that case the facts were substantially similar to those in the present case. The defendant, the St. Louis & San Francisco Railway Company, was an interstate carrier. The deceased was employed by the defendant as a yard clerk in its North Sherman yard, his principal duties being akin to those of Rosenbloom's. His duties related to both intrastate and interstate traffic, as did Rosenbloom's, and at the time of his injury and death he was on his way through the yards to meet an incoming interstate freight train for the purpose of checking the numbers of the cars and otherwise performing the duties in respect to them. While so engaged he was struck and fatally injured by a switch engine claimed to have been negligently operated by other employees of the defendant. The Court of Civil Appeals of Texas, on motion for rehearing, while recognizing the supremacy of the Federal statute, held that the evidence did not bring the case within that statute, basing that conclusion on the theory that the North Sherman yards were the terminal for that particular train, and that, therefore, when the train reached the yards it had finished its run, and as the evidence did not show that any of the cars

in the train were destined to other points the train was not an interstate train at the time Seale crossed the yards to examine it. On that point this court said, page 161:

> "In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the State line. McNeill *vs.* Southern Railway Co., 202 U. S., 543, 559. See also Johnson *vs.* Southern Pacific Company, 196 U. S., 1, 21."

It is submitted that the Federal question raised in this case is not only substantial, but controlling, and that the trial court's refusal of the special charge submitting to the jury the disputed issue of fact as to the character of Rosenbloom's employment at the time of the injury was reversible error.

J. W. TERRY,
GARDINER LATHROP,
A. H. CULWELL,
ALEX. BRITTON,
EVANS BROWNE,
Attorneys for Plaintiff in Error.

No. 613.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

PECOS AND NORTHERN TEXAS RAILWAY COMPANY,
Plaintiff in Error.

vs.

MRS. M. A. ROSENBLOOM, FOR HERSELF AND IN BEHALF OF MILTON ROSENBLOOM, ET AL.
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

J. W. TERRY,
GARDINER LATHROP,
ALEX BRITTON,
A. H. CULWELL,
Attorneys for Plaintiff in Error,
Pecos and Northern Texas Railway Company.

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Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This suit was instituted by Mrs M. A. Rosenbloom as surviving wife and in behalf of Milton Rosenbloom and Matilda Rosenbloom, surviving children, and Minnie Rosenbloom and Isaac Rosenbloom, as surviving parents of M. A. Rosenbloom, deceased, and by her third amended original petition it was alleged that while her husband was in the discharge of his duties as an employee of defendant Railway Company in its yards at Amarillo, Texas, as yard clerk on November

27th, 1909, was killed by one of defendants trains or engines under circumstances substantially as follows: That deceased was in the discharge of his duties, which required him to be in the railway yards for the purpose of taking the numbers of all cars going out of said yard and preserving a record of same, and for the purpose of sealing all cars going out of said yards that needed to be sealed, and that while so engaged upon above date there was a long freight train of about 30 cars situated on switch track No. 4, he being between said track and track No. 5 getting the numbers of the cars in said freight train, and while said train was moving out on its regular run along said track the deceased walked along by the side of said train with his face towards the north in the same direction in which said freight train was moving for the purpose of observing and getting the numbers of the cars in said freight train; that thus engaged he was in the performance of his regular duties and while in the exercise of all due care and caution that an engine approached at a very high rate of speed, pushing a ballast car down track No. 5 in the same direction in which the freight train was moving and without ringing the bell or giving any notice to deceased, that said ballast car struck deceased with great force and violence and killed him. That the open space between tracks No. 4 and No. 5 was very narrow and that if a man standing between said tracks moved to one side or the other he would be struck by one of said

trains. That those in charge of the crew of the switch engine which was pushing the ballast car saw deceased and saw that he was in great danger and realized that he was in a perilous situation. That said switch engine was equipped with defective brakes, which was known to those operating the same, who also knew that it was dangerous to run said engine without apprising deceased thereof. Yet knowing all these things said employes negligently and without regard for the safety of the deceased and without ringing the bell or blowing the whistle on said engine, and without taking any precaution to notify the deceased of the approach of the engine and ballast car, and without slackening the speed of same, and knowing that deceased was engaged in observing said freight train, and when said engine and ballast car was within some eighteen or twenty feet of deceased he discovered same and becoming confused attempted to cross said switch track No. 5 in front of said approaching switch engine and ballast car and was struck and killed. That it was the duty of those in charge of said engine and car to use every means at their command, consistent with the safety thereof, to avoid striking deceased, and that after discovering his peril said switch engine and ballast car could have been stopped and the accident averted and the failure so to do was charged as negligence. (Printed Record pp. 1-5.)

The defendant Company by amended answer, a-

mong other defenses, plead that it was engaged in interstate commerce and that at the time of the accident in question was so engaged and that the freight train with which and around which the deceased was at work at and immediately before his death was a train loaded principally with freight being transported interstate and used in interstate commerce, and that the acts and duties of deceased in connection therewith were acts of Interstate commerce, being done and performed by him as an employee of defendant, and that his acts were such as were necessary to a proper handling and transportation of said freights in said train, and that by reason thereof both the plaintiff and defendant were subject, as affecting liability to the provisions of the Act of April 22nd, 1908, Chapter 149, 35th Statute, L-65, commonly known as the Federal Employers' Liability Act, and that thereunder the plaintiff had no right to maintain this suit or to recover in the capacity in which she sued, and that the suit by her as herein filed was not one authorized under said Federal Statute. (Printed Record pp. 7-8.) There was a verdict and judgment in favor of plaintiffs for the total sum of Seven Thousand Dollars ($7,000.00), which was awarded Two Thousand Dollars ($2,000.00) each to the widow and two children and Five Hundred Dollars ($500.00) each to the father and mother (Printed Record p. 51), and from this judgment an appeal was taken to the Court of Civil Appeals of the Eighth

Supreme Judicial District of Texas, where, by written opinion, filed October 28th, 1911, (Printed Record, p. 113), this judgment was affirmed. A motion for rehearing made by the Railway Company was by said court overruled. (Printed Record, p. 140). Whereupon plaintiff in error obtained a writ of error to the Supreme Court of the State of Texas and said court by written opinion filed February 10th, 1915, affirmed the judgment of the Court of Civil Appeals (printed record, 176), whereby was affirmed the judgment of the trial court. Plaintiff in error's motion for rehearing filed in the Supreme Court of Texas was by said court on June 26th, 1915, overruled by written opinion. Whereupon the writ of error herein presented was allowed by Associate Justice Lamar. The Court of Civil Appeals in affirming the judgment of the court below, and as part of its opinion, filed the following as its conclusions of fact:

> "1. Appellant is a railway corporation, owning and operating a line of railroad, extending from Amarillo southwesterly to the New Mexico-Texas state line at Texico, where it connects with the line of the Eastern Railway Company of New Mexico and its line connects at Amarillo with that of the Southern Kansas Railway Company of Texas.
>
> "2. On and prior to the 27th day of November, 1909, defendant company was engaged in transporting freight and passengers for hire, being a common carrier, duly organized and chartered,

under the laws of the state of Texas, and engaged in a railway transportation business.

"3. In connection with its connecting lines, known as the 'Santa Fe System' lines and other lines, it was and is engaged in transporting goods and passengers intrastate and interstate, about eighty-five per cent of its traffic for the month of November, 1909, having been interstate and about fifteen per cent thereof intrastate.

"4. In connection with its business as such common carrier, it has and owns and owned and was operating extensive switch yards, storage tracks, shops, etc., on and prior to November 27, 1909, at Amarillo, in Potter county, Texas. There were three of its yards, known as the east, the middle and the west yards, respectively.

"5. M. A. Rosenbloom became an employee of defendant about the firs day of November, 1909, at Amarillo, Texas, in the capacity of seal clerk and continued to be so engaged until the time of his death, which was about six o'clock p.m. November 27, 1909.

"6. As such clerk, it was the duty of M. A. Rosenbloom to go in, on and about said yards and there seal all incoming and outgoing trains and take a list of the cars in each such train by car numbers and initials, note the condition of each car, especially as to the door being sealed and seal all unsealed doors, look about icing refrigerator cars, etc., and report cars for icing, etc., and note broken car doors and report losses of freight, etc. Of such matters it was his duty to make a record,

which was kept in a book in the yard-master's office, from which to answer questions and correspondence in the future, making inquiries as to the condition of cars and freight passing through the Amarillo yards.

"7. The yards aforesaid were in constant use day and night during the time Rosenbloom was so engaged with switch engines, with their cars, and incoming and outgoing trains, coming and going constantly.

"8. In said middle yard, where Rosenbloom was killed, there were seven switches or yard tracks, all lying east of appellant's main line track, extending practically north and south, parallel and numbered from one to seven inclusive, and consecutively, from west to east.

"9. At the time of the death of Rosenbloom there was a long freight train, about thirty-four cars, leaving from track No. 4 in these middle yards to go out at the north end of the line and thence onto Wynoka, Oklahoma, interstate over the line of the Southern Kansas Railway Company, Such train was made up of cars which had come in from New Mexico over appellant's line and was going out over the Southern Kansas to points in Oklahoma, Kansas, Missouri, Illinois and other states, excepting one car, which was well drilling tools, consigned to Panhandle, a point in Carson County, Texas, which would be reached without leaving the state, and which car of tools had originated at Amarillo, Texas, to be used in work on the company's water station at Panhandle.

"10. While such train was moving out slowly from said track, Rosenbloom was going down between tracks 4 and 5 by the side of said outgoing train from south to north, for what purpose is not shown by the testimony, nor is it shown what he had immediately preceding his being killed been doing.

"11. As such outgoing train and Rosenbloom were so moving, one of the day switch cars having coupled an engine on to the south end of a ballast car, somewhere to the south of where Rosenbloom was, came north (the same direction as the outgoing train and Rosenbloom was moving) on track 5, intending to go a few car lengths beyond where they struck Rosenbloom and there couple on to some coal cars and pull them back south on track 5. The crew handling this switch engine and ballast car were not engaged in interstate commerce at the time Rosenbloom was killed.

"12. As this switch engine and ballast car were about to pass Rosenbloom from some cause and by some means, which are in dispute, he got in front of the ballast car, was knocked down, run over and killed.

"13. Rosenbloom was the husband of Mrs. M. A. Rosenbloom, plaintiff, the father of Milton and Matilda, and the son of Isaac and Minnie Rosenbloom; was 26 years old at the time of his death and earning sixty dollars per month, and during the time of his employment he had resided with his family at Amarillo, Texas." (Printed Record, pp. 116-117.)

And the Supreme Court on motion for rehearing found additionally as follows:

> "At the time of Rosenbloom's death a freight train of the plaintiff in error was leaving its yards in Amarillo upon track No. 4, moving out slowly upon the track. Just before his death, Rosenbloom was walking between track No. 4 and track No. 5, immediately adjacent, in the same direction the train was moving. The Court of Civil Appeals has found that the testimony did not disclose for what purpose Rosenbloom was walking between the tracks by the side of the moving train, or what he had been doing, if anything, just before the accident. This freight train was composed of cars which had come in from New Mexico over the line of the railway company and were destined for points without the State of Texas, except one car destined for a point within the State of Texas. The original opinion was possibly further inaccurate in stating that the space between the tracks was so narrow that one standing between them with cars upon one of the tracks was in danger of being knocked down by passing cars upon the other". (Printed Record, p. 185.)

And in connection with such findings of said court and as bearing upon the duties of the deceased as Yard Clerk, the witness, J. N. Haney, Jr., in behalf of the plaintiff testified as follows:

> "Mr. Rosenbloom was killed on track number five. He was in the service of the defendant at that time. He was employed as yard clerk or

assistant yard clerk, I do not know which. His duty was to seal the cars that either came into the terminal not sealed and to seal all cars that were loaded here for the purpose of being moved and on the arrival of inbound train to take what is called a switch list for use as reference and to note the condition of the cars and the destination of the cars. That was a part of his duty. I do not know for sure whether he was supposed to keep a record of the property in the different cars for his own individual use or turn it over to the Yard office, but I believe he did. His duties as Yard Clerk required him to be around among the cars in the yard on any part of the yard. I have seen him performing such duties in both ends and the center of the yards. (Printed Record, p. 67.)

and also:

"Mr. Rosenbloom was assistant yard clerk or bill clerk. It was his duty to go out when a train came in either over the Pecos & Northern Texas Railway Company's line or over the Southern Kansas Railway Company's line into the yard and take the initials and car numbers of the cars in the train and a record of the seals. To my knowledge, that was his duty and I have noticed men employed in that capacity and I think it is their duty. Those were what I understood Rosenbloom's duties at the time he was killed. When a train was leaving these yards and going out over either the Pecos & Northern Texas Company's line of road or that of the Southern Kansas Railway Company of Texas, it was his duty to go along and check up

and take a record of the cars with their numbers and initials in the train and to make a record of the seals of each car. My understanding was that it was his duty after he had taken a record of that kind to report it and make a record to be kept on file in the office. ***He was performing that duty at the time he was killed. He appeared to be doing that kind of work or that kind of business at the time of the accident.*** [*Italics are ours.*] (Printed Record, p. 70.)

J. S. Bell, testified as follows:

"I am acquainted with the duties of an assistant car seal clerk, as they keep the seals and attend to their business, and as they work here in Amarillo. When trains come in from Clovis, over the Pecos and Northern Texas Railway Company's line, coming east from New Mexico, and going out over the Southern Kansas lines east, such clerk is supposed to take the seal numbers on each side, up one side and back to the other, providing the train stands still long enough. He goes up one side of the train and down the other and he takes the number of the seal on the car door of each car and observes the position of the ventilators, and takes car numbers and initials of each car and writes it down in a book, and if there is anything wrong with the ventilators or anything to be done, he makes a note of that and reports. He also makes a note of whether or not the car is iced and reports that. He makes a report of all those things. After he has taken down all these matters

in a book he takes the book back to the office and it is a part of the records at the yard office for reference in correspondence. The book is kept there as a record of a part of the business in handling trains and to answer correspondence from, and to give the condition of the car when it passed through Amarillo, and to know whether or not it was sealed and whether or not it came in unsealed and what seal it was under. Except as above stated to answer correspondence by, I don't think there is any report made out of this book. Correspondence coming from the Claim Department in regard to the condition of the stuff, or any inquiries about it, would cause them to refer to this book to answer any such correspondence. The Claim Department may want to know the condition of a car, whether it came in under seal or not and then this book would be used to tell them with reference to that. In this book they make notations as to the condition of the car and of the ventilators and whether or not it had ice, and the condition of the freight inside. The contents would be checked if it was unsealed and they would note whether or not the car had been pilfered and a notation of the shortage, if any, would be made.

"Mr. Rosenbloom, before he was killed, was seal clerk and it was his duty to perform this work —all this work that I have been talking about were—was in line of his duty." (Printed Record, pp. 105-106.)

Avery Turner testified as follows:

"In November, 1909, I was acquainted with the

general run of freight being transported over these lines and the proportionate parts that were interstate and local. I know it by general observation and can approximate the proportionate part that was interstate and that that was local of freight that was then being transported by these Companies. On the twenty-seventh day of November, 1909, about eighty-five per cent of all the freight handled by these Companies was interstate. I will say that about eighty-five per cent of all their business was interstate." (Printed Record, p. 107.)

The witness A. D. Thomas, who was one of the Brakemen on the front train that was pulling out of the yards on track number four at the time of the accident, testified:

"I saw the accident resulting in the death of Rosenbloom in the yards there. I was about one hundred and fifty feet from Rosenbloom at that time. I was on the ground between tracks four and five and train number thirty was pulling along beside me. Train number thirty was on track number four pulling out. When I first saw Rosenbloom he was on the rear end of our train riding down track number four. I was then at the head end of the train going east. We pulled out slow and he stepped off. I could not say how long it was after he stepped off our train until he was run over by the ballast car. I could not approximate how far it was. When he stepped off our train—that is train thirty that went out on four, he walked along between the tracks and was at about the

end of the ties on track number five, and he walked along there until they attracted his attention with the whistle on the train that ran over him. I heard someone halloo at him————

"——He had been walking along there slow with his head down with a paper in his hand—with a paper or something in his hand. They struck him before he got over. The ballast car struck him."

It appeared without controversy that this freight train contained thirty-six cars and a caboose, all of which carried interstate freight and merchandise except one. (Printed Record, p. 92.)

Plaintiff in her amended petition, and on which this case was tried, alleged:

"Plaintiff says further that on or about the 27th day of November, 1909, at about 6 o'clock p. m. there was a long freight train consisting of about thirty cars situated on Switch Track No. 4, and that as was the duty of her said husband, M. A. Rosenbloom, he was in said yards between tracks Nos. 4 and 5, getting the numbers of the cars in said freight train; that while her said husband was engaged in said duty, said freight train was moving out on its regular run and was moving out along said switch track No. 4, and that her said husband was between said tracks Nos. 4 and 5 with his face toward the north in the same direction in which said freight train was moving and was walking along by the side of said freight train for the purpose of observing and getting the

numbers of the cars in said freight train while the same was pulling out. Plaintiff says further that while said freight train was moving out her said husband was engaged in the performance of his regular duties, as above stated, and while exercising all due care and caution, that an engine in charge of the employes of the defendant Company at a very high rate of speed, pushed a ballast car down Track No. 5 in the same direction in which said freight train was moving; that said engine pushing said ballast car, which was about 40 feet long and a very wide car extending for over track No. 5, ran or pushed up behind her said husband, and without ringing the bell or giving any other sufficient notice to apprise her said husband that said ballast car was approaching behind him, ran said engine and ballast car with great force and violence, and without any sufficient notice or warning to her said husband; that said engine and ballast car was approaching and struck her said husband with great force and violence and knocked him down and ran over him and crushed him to death." (Printed Record, pp. 2-3.)

The defendant plead the provisions of the Federal Employers' Liability Act in bar of the right of these plaintiffs to recover in the capacity in which they sued. (Printed Record, p. 8.)

On the trial of this case, the railway company requested the Court to give the following special charge, which was refused:

"If M. A. Rosenbloom at the time of his death

was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and a customary work reasonably carried on by defendant as a part of its business transporting freight interstate over its lines or if he had then just completed such inspection *or* said train and had not yet completed his record and placed—in its place where usually kept, then you will return a verdict for the defendant on its special plea that plaintiff had no right to maintain this suit in the capacity in which she sues." (Printed Record, p. 50.)

And by its motion for new trial the refusal to give this charge was assigned as error (Printed Record, p. 55), as was also done by assignments of error in the Court of Civil Appeals (Printed Record, p. 62) and the Court of Civil Appeals directly passed upon and determined the Federal questions presented under our assignments of error herein adversely to our contention (see opinion, Printed Record, p. 113,) and by motion for rehearing in that court the rights of the plaintiffs to recover herein in the capacity in which they sued, as well as the failure of the court to give the special charge above set out, was presented (Printed Record, p. 28), as was also done in the Supreme Court (Printed Record, p. 149, and the questions here raised were directly determined by the Supreme Court of Texas adversely to the contention of the plaintiff in error (Printed Record, p. 176.)

Our cause is one, therefore, of which jurisdiction is given to this court by Section 237 Judicial Code.

SPECIFICATIONS OF ERROR.

"First. The Supreme Court of the State of Texas erred in holding that under the facts of this case there was a right of action in favor of the defendants in error against the plaintiff in error, the facts showing as they do that plaintiff in error was a railroad engaged in interstate commerce, and that deceased as its employee likewise engaged in handling interstate commerce at the time of the accident in question. In such circumstances the right of action is only in a personal representative and same is not in the beneficiaries.

"Second. Under the facts of this case the rights and liabilities of the parties are controlled by the Act of Congress of April 22nd, 1908, the same being Chapter 149, 35th U. S. Statute, L. 65, and commonly known as the Federal Employers' Liability Act, the facts showing as they do that plaintiff in error Railway Company was engaged in interstate commerce at the time of the accident in question and that deceased as its employee was likewise so engaged, and the Supreme Court of Texas erred in affirming the judgment against plaintiff in error, thereby holding that the beneficiaries defendants in error therein could maintain this action, the same being an action resulting in death.

"Third. The Supreme Court of the State of Texas erred in affirming the ruling of the Court of Civil

Appeals to the effect 'that there was no evidence before the court upon which they could say that Rosenbloom was engaged in interstate commerce at the time even if it be held that the work he was doing would constitute interstate commerce, provided there were any cars in the train which were carrying interstate freight.' Such holding was erroneous because the evidence shows and both the Court of Civil Appeals and the Supreme Court found as a matter of fact that Rosenbloom was engaged in checking a certain train, taking the car numbers and initials, making a record of the seals of the car doors, etc., and the undisputed testimony shows conclusively and the Court of Civil Appeals (which has final jurisdiction on questions of fact under the practice in Texas) found as a matter of fact that such train was moving and carrying freight interstate 'from Amarillo, Texas to Waynoka, Oklahoma,' so that as a matter of law Rosenbloom was engaged in interstate commerce and the Federal Employers' Act of Congress of June 22nd, 1908, governs to the exclusion of the State statute and as this suit was not maintained as required thereunder the judgments of the trial court and of the Court of Civil Appeals should have been reversed by the State Supreme Court and the cause dismissed.

"Fourth. The Supreme Court of Texas erred in holding that the trial court committed no error in failing and refusing to give defendant's special charge No. 13 to the jury, which said charge was as follows:

"'If M. A. Rosenbloom, at the time of his death, was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part, and a customary work reasonably carried on by defendant as a part of its business transporting freight interstate over its lines or if he had then just completed such inspection *or* said train and had not yet completed his record and placed in its place where usually kept, then you will return a verdict for defendant on its special plea that plaintiff had no right to maintain this suit in the capacity in which she sues.'

And in affirming the judgment entered by the Court of Civil Appeals herein, whereby said Court of Civil Appeals held that there was no error in failing and refusing to submit the issue presented by said special charge to the jury.

"Fifth. The Act of Congress of April 22nd, 1908, same being Chapter 149, 35th U. S. Statute, L. 65, and commonly known as the Federal Employers' Liability Act, imposed a liability for injuries resulting in death in derogation of the common law, and providing as it does that in all actions founded thereon the damages recoverable shall be diminished in proportion to the the amount of negligence attributable to the deceased employee, the defendant Company is not deprived of the right to plead and have the negligence of such deceased employee considered to lessen the amount of

recovery by reason of discovered peril being the only issue of liability submitted to the jury by the trial court, and the Supreme Court of Texas erred in holding that under the facts of this case there was no issue of contributory negligence to be submitted because the issue of discovered peril was the only one to be determined by the Jury." (Printed Record, pp. 191-192.)

BRIEF OF ARGUMENT.

There are two questions presented in this case and which are raised by our specifications of error as follows:

First: That deceased at the time of the accident was engaged in interstate commerce as an employee of the defendant Company, and, therefore, that any action arising out of his death could only be prosecuted under the Federal Employers' Liability Act, and Second, if it did not conclusively appear that deceased was engaged in interstate commerce at the time of the accident, yet the facts were sufficient to make it incumbent upon the court to submit the same as an issue to be determined by the jury; in other words, that if it did not conclusively appear that deceased was engaged in interstate commerce so that the court should assume this condition, yet enough was presented to require the giving of the special charge which is made the basis of our fourth specification of error, and which has been set out in our statement of this case.

Both the Court of Civil Appeals and the Supreme Court of Texas concede that the freight train which was leaving the yards on track No. 4 at the time of this accident was an interstate train, but it is said that there was no sufficient evidence to show what deceased was doing at and immediately before his death, to indicate whether or not he was employed in interstate commerce, and that, therefore, the case was not one controlled by the Federal Employers' Liability Act. The deceased was employed as a Yard Clerk, his duties being to check the cars, take seal numbers, etc., on all cars arriving in and departing from the yards in Amarillo. In other words, his duties were to all intents and purposes the same as were the duties of Seale in case of St. L. S. F. & T. Ry. Co. vs. Seale, 229 U. S., 156. He had no other duty in connection with the business of the defendant Company and no other right in its yard than as pertained to this employment. He was in the yard in connection with an outgoing interstate freight train, and it will be presumed, as we believe, that he was there in the discharge of a duty. A wrongful purpose to his presence will not be imputed where a proper one is reasonably deducible from the surrounding circumstances, but we are not left to conjecture entirely as to what deceased was doing in the yard at that time. J. N. Haney testified that he was doing this work at the time he saw him which was just before the accident. It is fair to conclude that this

work had been finished as the train was leaving the terminal, and, of course, also to assume that at the exact moment deceased was killed he was on his way back to his office. If the duty entrusted to him and for which he had been employed had been performed in connection with that particular train, this would not destroy the interstate character of his service, nor deny to the Railway Company the right to have the suit prosecuted under the Act of Congress.

In the case of North Carolina Railroad vs. Zachary, 232 N. S., 248, the evidence showed that the deceased a fireman on an engine about to begin a trip, and after he had prepared his engine for this purpose, left the same and was going to his boarding house at the time he was hurt, and contention was made that because of this the Federal Employers' Liability Act would not apply and on that question this court, speaking through Mr. Justice Pitney, said:

> "Again, it is said that because deceased had left his engine and was going to his boarding-house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of

> the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See Missouri, Kansas & Texas Ry. Co. vs. United States, 231 U. S. 112, 119."

And the case of St. L. S. F. & T. Ry. Co., vs. Seale, 229 U. S. 156, in many respects is quite similar to the one at bar. There the deceased was employed as Yard Clerk, his duties relating both to interstate and intrastate traffic, and at the time of his injury was on his way through the yard to meet an incoming freight train from a point in Oklahoma. His purpose in going into the yard was to take the numbers of the cars of the incoming trains, but before reaching the place for the performance of this duty was struck by a switch engine, and speaking *to* the question here presented, the court, through Mr. Justice Van Devanter, used this language:

> "In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate train but was engaged in the movement of interstate freight, and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond.

> Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line. McNeil v. Southern Railway Co., 202 U. S., 543, 559. See also Johnson v. Southern Pacific Company, 196 U. S. 1, 21."

And to the same effect was the holding of this court in Pedersen vs. D. L. & W. R. R., 229 U. S., 146. We direct your attention also to N. Y. C. & H. R. R. vs. Carr, 238 U. S., 262, and particularly to the following announcement by Mr. Justice Lamar, in speaking to the purpose and scope of the Federal Employers' Liability Act:

> "The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employes often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the State from interstate business. The present case is an instance of that kind—and many arguments have been advanced by the Railway Company to support its contention that, as these two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was

employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employe at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip he is entitled to the benefits of the Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

And likewise to the following:

"Each case must be decided in the light of the particular facts with a view of determining whether at the time of the injury, the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury and the judgment in his favor must be *affirmed.*"

The latest case which has been called to our attention involving a construction of this Act is Shanks vs. D. L. & W. R. R., decided by this court in an opinion delivered by Mr. Justice Van Devanter, January 10th, 1916, and wherein the authorities are reviewed and above principle ~~origin~~ announced.

Adopting, therefore, the rules announced in these decisions it would appear that no reasonable deduction can be drawn from the facts of this case than that

deceased was an employee of the defendant engaged in interstate commerce at the time of this accident. In truth, it occurs to us that the plaintiff cannot dispute this contention because such is the allegation of her petition. Her cause was predicated, as appears from the statements of her petition, upon the direct allegation that the deceased was in the yard in the discharge of his duties in checking this train at the time of the accident. This allegation was admitted by the defendant in its answer, that is, it likewise alleged service in interstate commerce and thereunder plead that plaintiffs were not entitled to recover. We direct your attention especially to the allegations of plaintiff's petition, which are set out in our statement of this case.

If, however, it shall be concluded that the court was not warranted in declaring, as a matter of law, that the deceased was engaged in interstate commerce at that time, then we present that it was the duty of the court to give its special charge No. 13, which is made the basis of our fourth assignment of error, and which charge was as follows:

> "If M. A. Rosenbloom, at the time of his death was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part, and a customary work reasonably carried on by defendant as a part of its business transporting

> freight interstate over its lines or if he had then just completed such inspection *or* said train and had not yet completed his record and placed in its place where usually kept, then you will return a verdict for defendant on its special plea that plaintiff had no right to maintain this suit in the capacity in which she sues." (Printed record, p. 192.)

The defendant Company was entitled to an affirmative presentation of each of its defenses which arose and on which there was evidence to sustain. Certainly, in view of the allegations of plaintiff's petition, as well as the findings of fact of the Court of Civil Appeals, and the evidence of the witnesses Haney, Bell and Turner, which are set out in our statement, the question was so directly presented as to require the submission of the issue to a jury.

As was said by this court in North Carolina R. R. Co. vs. Zachary, 232 U. S., at page 258: "Of course, if upon the evidence any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question," and also the following: "We conclude that with respect to the facts necessary to bring the case within the Federal Act, there was evidence that at least was sufficient to go to the jury. It is doubtful whether there was sufficient contradiction respecting any of these facts, but this we need not consider."

While we contend that there was no such conflict in the evidence as to raise any question of doubt, but on the contrary that the record affirmatively presents a case arising under the Federal Employers' Liability Act, yet in any event the plaintiff in error was entitled to have the issue determined under proper instructions of the court, and this has been denied.

The recovery in this case is in behalf of the widow, children and parents of the deceased. We do not deem it necessary to cite at length authorities to the effect that under the Federal Employers' Liability Act the action can only be maintained by a personal representative (St. L. S. F. & T. R. R. Co. vs. Seale, 229 U. S., 156, and authorities there cited), and also that under the statute it appearing that deceased left a widow and children, the parents were not entitled to recover, and that there was no cause of action in their behalf. (St. L. S. F. & T. vs. Seale, supra; G. C. & S. F. Ry. Co., vs. McGinnis, 228 U. S., 173, and other cases cited.)

Summing up, therefore, and on the entire case, we present that this record shows the following essential facts:

First. The plaintiff in error was an interstate carrier and that its train leaving the yards at the time in question was a train handling interstate commerce.

Second. Deceased was employed by the Railway Company as a Yard Clerk. His duties consisted

principally of checking the numbers and initials of cars moving in and out of the yards, both interstate and intrastate, and that 85% of these cars were engaged in handling interstate commerce.

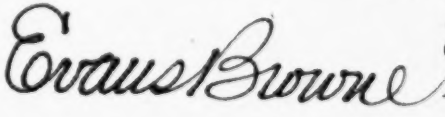
Third. That at the time of his death he was walking beside the above interstate train for the purpose, as was his duty, to get the numbers of the cars in said train and check the same.

Fourth. That while so engaged he was struck by a ballast car pushed by a yard engine and instantly killed.

Fifth. If it shall be held that these conclusions may not be reached as a matter of law, that there was sufficient evidence thereon to require the submission of the issue to the jury as was proposed by our special charge No. 13.

Sixth. That in either event, the suit could only be maintained by a personal representative and that no recovery was warranted, even in an action by a personal representative, in behalf of the mother and father under the Federal Employers' Liability Act.

Respectfully submitted.



J. W. TERRY,
GARDINER LATHROP,
ALEX. BRITTON,
A. H. CULWELL.
Attorneys for Plaintiff in Error,
Pecos and Northern Texas Railway
Company.

No. 613.

In the Supreme Court of the United States

OCTOBER TERM, 1915.

PECOS & NORTHERN TEXAS RAILWAY COMPANY,
PLAINTIFF IN ERROR,

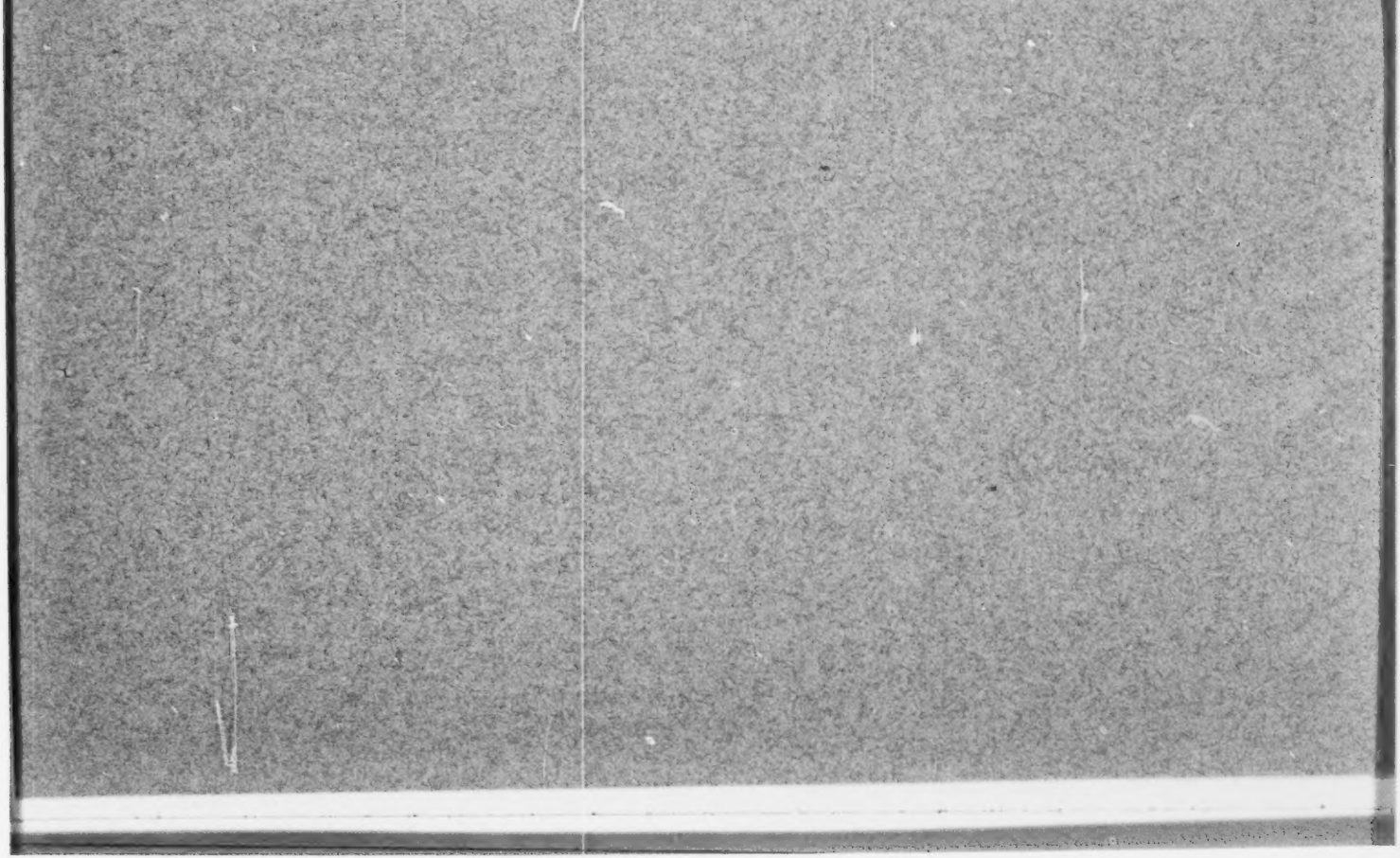
vs.

MRS. M. A. ROSENBLOOM, ET AL,
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR

JAMES D. WILLIAMSON,
Attorney for Defendants in Error, Mrs. M. A. Rosenbloom, et al.

J. A. STANFORD, of Waco, Texas,
H. H. COOPER, of Houston, Texas,
Also on Brief for Defendants in Error.



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BRIEF FOR DEFENDANTS N ERROR.

The Conclusion of Fact by the Court of Civil Appeals is binding upon our Supreme Court.

Texas Civil Statutes, Art. 1636.

T. & N. O. Ry. Co. vs. Echols, 28 S. W., p. 516; 86 Tex., p. 339.

Hunter vs. Eastham, 69 S. W., p. 68; 95 Tex., p. 654.

The above proposition is admitted by Plaintiff in Error.

2. The Court of Civil Appeals found: "While such train was moving out slowly from said track, Rosenbloom was going down between tracks 4 and 5 by the side of said out-going train from south to north, for what purpose is not shown by the testi-

mony, nor is it shown what he had immediately preceding his being killed been doing." (See par. 10, Finding of Fact, by Court of Civil Appeals, printed record, p. 117.)

The Court of Civil Appeals found also, "The yards aforesaid were in constant use, day and night, during the time Rosenbloom was so engaged with switch engines, with their cars, and in-coming and out-going trains, coming and going constantly." (Par. 7, Finding of Fact, printed record, p. 116.)

On this same point the Supreme Court of Texas, on motion for rehearing, used the following language: "The opinion delivered in the case by the late Chief Justice Brown on the original hearing, in its statement of the case, is corrected in the following particulars so as to conform to the findings of fact made by the Honorable Court of Civil Appeals.

At the time of Rosenbloom's death a freight train of the Plaintiff in Error was leaving its yards in Amarillo upon track No. 4, moving out slowly upon the track. Just before his death Rosenbloom was walking between track No. 4 and track No. 5, immediately adjacent, in the same direction the train was moving. The Court of Civil Appeals has found that the testimony did not disclose for what purpose Rosenbloom was walking between the tracks by the side of the moving train, or what he had been doing, if anything, just before the accident. This freight train was composed of cars, which had come in from New Mexico over the line of the Railway Company and were destined for points without the State of Texas, except one car destined for a point within the State of Texas.

The original opinion was possibly further inaccurate in stating that the space between the tracks was so narrow that one standing between them, with cars upon one of the tracks, was in danger of being knocked down by passing cars upon the other. * * * * It was not shown here that Rosenbloom had been engaged in any service connected with the interstate

freight train, and in the state of the evidence his walking through the yards cannot be said to have had any association with a duty with respect to it. The finding of the Court of Civil Appeals is definite, to the effect that the evidence did not disclose for what purpose he was walking through the yards, or what character of work he had been engaged in just before his injury." (Printed record, pages 185-186.)

3. The above finding of fact by the Court of Civil Appeals of Texas, which is approved and confirmed by the Supreme Court of Texas, is supported by all the evidence, when properly analyzed, without any conflict.

J. N. Haney, brakeman on the front end of the ballast car that ran over Rosenbloom, testified as follows: "As we were backing down north on track No. 5, I saw M. A. Rosenbloom. I should say he was perhaps twenty car lengths ahead of us when I first saw him. A car length is about from 30 to 40 feet. He was walking between tracks 4 and 5, and was walking north. His back was then turned toward our ballast car and switch engine. At the same time I first saw Rosenbloom, the out-going train on track 4 was moving north. Rosenbloom seemed to be walking between the tracks and I *could not tell whether he was taking the numbers of the cars or noticing the marks,* OR WHAT HE WAS DOING. I do not suppose there was a period of three seconds during that time that I did not see him. I continued to observe Rosenbloom from the time I first saw him until he was run over. * * * * The out-going freight train was moving 8 to 10 miles an hour at that time. Its speed was increasing as it pulled out." (Printed record, bottom page 68 and top of page 69.)

On cross-examination, in reference to a statement that the witness, J. N. Haney, had made, he said: "I cannot tell whether or not I said to Mr. Miller, 'Mr. Rosenbloom was walking along leisurely and rather unconcerned, with his hat

thrown back on his head,' or not, but it is contained in the statement which I signed." (Printed record, page 75, near bottom.)

No witness in this case testified to seeing Rosenbloom do anything in connection with the out-going freight or anything else except walking through the yards between said tracks.

J. L. Walker, the engineer of the switch engine that ran over Rosenbloom, and who testified to seeing him for some time before striking him, said: "He was not looking up at the sides like he was taking the numbers of the cars. He was walking along there by the side of the train, but he was not looking up at the cars." (Printed record, page 86, 12th line from bottom of page.)

Chas. Fullington, the rear brakeman on the switch engine and ballast car that ran over Rosenbloom, and who observed Rosenbloom for some time before striking him, in testifying on cross-examination in reference to his verbal statement to counsel for Plaintiff in Error, in the trial Court, said: "They simply asked me the questions about where Rosenbloom was, and what he was doing down there, and I told them that I *didn't know*, and that was the truth. I didn't know. I didn't know *what* he was doing, *where* he was going, or *what* he was going for." (Printed record, top page 105.)

4. The Finding of Fact by the two Higher Courts of the State will be accepted by the Federal Supreme Court as conclusive of the facts, unless it be shown by the record that such findings are without evidence to support them, or unless findings of law and fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Mo. Pac. Ry. Co. vs. North Dakota, Ex Rel. McCue, 236 N. S., 585.

Kansas City Southern Ry. Co. vs. C. H. Albers Com. Co., 223 N. S., 573.

Creswill vs. Grand Lodge K. P., 225 N. S., 246.
Wood vs. Chesborough, 228 N. S., 672.

REMARKS.

The Conclusions of Fact found by the Court of Civil Appeals of Texas and approved by the Supreme Court of Texas, establish the following facts:

1. The Pecos & Northern Texas Railway Company was both an interstate and intrastate carrier.

2. Rosenbloom was employed by the railway company as a yard clerk, and his duties required him to perform service in connection with both interstate and intrastate cars.

3. That at the time of Rosenbloom's death he was walking through the yards of the railway company between tracks 4 and 5, and a freight train composed of both interstate and intrastate cars was passing him going in same direction he was going, on track No. 4.

4. For what purpose Rosenbloom was walking through the yards is not shown by any evidence, and there is no evidence of what he had been doing just before he was killed.

5. That while walking between said tracks 4 and 5, he, by some manner, got on track 5 and was struck by a ballast car and yard engine and instantly killed.

By reference to pages 30 and 31 of brief of plaintiff in error it will be observed the only controversy in this case is, as to the facts stated in paragraph 4 above, and in paragraph 3, page 30 of brief by plaintiff in error.

In other words, the Courts of last resort in Texas, found: "There was no evidence to show for what purpose Rosenbloom was walking through the yards at the time he was killed." Plaintiff in error contends this finding is not supported by the evidence—that Rosenbloom was engaged in getting the numbers.

etc., of the out-going freight, or at least the evidence was such as to require the submission of such issue to the jury, as requested in its special charge No. 13. (Printed record, page 50.)

So the only question for this Court, is the finding of fact by the Texas Courts supported by the evidence? Or was the evidence such as to require the trial Court to submit the issue, as requested in special charge No. 13? And this requires a review of the evidence. The only evidence quoted by plaintiff in error, which they contend, tends to show that Rosenbloom was engaged in service in connection with the out-going freight, is the evidence of J. N. Haney, in italics, on page 13 of its brief. But this same witness testified that when he first saw Rosenbloom he was twenty car lengths ahead of the ballast car and switch engine backing down on him, Haney being on the front end of ballast car as it backed, and that he (Haney) continued to observe Rosenbloom from the time he first saw Rosenbloom until the ballast car struck him, and Haney said, "*I could not tell whether he was taking the numbers of the cars or noticing the marks or what he was doing.* He said further, "the out-going freight train was moving 8 or 10 miles an hour at that time." (Printed record, page 68.)

Evidently the words quoted and italicised by plaintiff in error, as coming from this witness, was simply the expression of a conclusion of the witness, based on the witness' knowledge of his general duties, and the fact that he was there in the yards, that he must have been engaged in some of his general duties, and is no more evidence that he was engaged in interstate commerce than it was that he was engaged in intrastate commerce. This same witness, in a signed statement made to the railway company, said: "Mr. Rosenbloom was walking along leisurely and rather unconcerned, with his hat thrown back on his head." (Printed record, page 75.)

The fact that while Rosenbloom was walking through the

yards between tracks 4 and 5, the freight was passing on track 4, going in the same direction, at the rate of eight or ten miles an hour, is no evidence that Rosenbloom was performing any service in connection with the freight; for the Court of Civil Appeals found, "The yards aforesaid were in constant use, day and night, during the time Rosenbloom was so engaged, with switch engines with their cars, and in-coming and out-going trains, coming and going constantly." (Printed record, page 116.)

The very fact that the out-going freight was moving eight or ten miles per hour, that Rosenbloom was facing the same direction the train was going and that Rosenbloom was walking, preclude the idea that he was performing duties in connection with this out-going freight, for it would be impossible for him to examine the seals, get the numbers, initials, etc., on cars moving eight or ten miles per hour, and if he had been trying to do so, he evidently would not have been walking in the same direction the train was going. There were four parties who saw Rosenbloom at the time and for a few minutes prior to the time he was killed, to-wit: J. N. Haney, who was on the end of the ballast car that struck Rosenbloom; C. E. Fullington, who was on the other end of the same ballast car; J. L. Walker, who was in the cab of the engine pushing the ballast car, and A. D. Thomas, who was about one hundred and fifty feet north of where Rosenbloom was struck, on the ground between tracks 4 and 5, and these were the only parties who did see him. None of them testified to seeing Rosenbloom doing anything in connection with the out-going freight. As stated above, Haney said: "I could not tell whether he was taking the numbers of the cars or noticing the marks, or what he was doing." (Printed record, page 68.) And again, in the statement, "Mr. Rosenbloom was walking along leisurely and rather unconcerned with his hat thrown back on his head." (Printed record, page 75.)

A. D. Thomas testified: "When I first saw Rosenbloom he

was on the rear end of our train riding down track No. 4 * * * when he stepped off our train he walked along between tracks 4 and 5, etc. (Printed record, page 92.)

C. E. Fullington said: "I don't know what he was doing where he was, or what he was going for." (Printed record, top page 105.)

J. L. Walker testified: "He was not looking up at the sides like he was taking the numbers of the cars. He was walking along there by the side of the train, but he was not looking up at the cars." (Printed record, page 86.)

No witness testified to seeing him doing anything in connection with the outgoing freight. There are no circumstances that tend to show he was so engaged, but on the contrary, the affirmative evidence of J. L. Walker, one eye-witness, is that he was not looking at the out-going freight, and when Thomas saw him he was riding down track 4 on the rear end of the out-going freight. This and every other circumstance preclude the idea that he was performing service on this freight while it was leaving the yards at the rate of eight to ten miles per hour. The fact that he was in the yards is no evidence that he was performing service in connection with the outgoing freight. And the fact he was in the yards does not tend to show he was engaged in interstate service any more than it does that he was engaged in intrastate service.

It is true while he was walking through the yards between tracks 4 and 5, at the time he was killed, an interstate freight was passing him at eight to ten miles per hour, but that is no evidence that he was performing service in connection with the freight. Of the four witnesses who saw him, Walker said, "he was not looking at the out-going freight." Thomas said, when he saw him, at first he was riding down track 4 on the rear of the freight, and then stepped off and was walking between tracks 4 and 5. What Thomas saw precludes the idea he

was performing service in connection with the freight. J. N. Haney said he didn't know whether he was getting numbers, noticing seals or *what* he was doing. C. E. Fullington said he did not know *what he was doing, where he was going or what* he was going for. If special charge No. 13 had been given, as requested by Plaintiff in Error, where is any evidence the jury could have considered tending to show Rosenbloom was inspecting or had just finished inspecting the interstate freight, or doing anything else except walking through the yards. If the four witnesses who saw him at the time he was killed and who had observed him for some little time just before, didn't know what he was doing, where he was going or what he was going for, how could the jury have determined without any evidence on which to base a finding. But Plaintiff in Error says: "It is fair to conclude that this work had been finished * * * and to assume he was on his way back to his office," etc. When there is no evidence that Rosenbloom had ever inspected this interstate train or a single car in it. And if he had when he had made such inspection, and to "assume," that he was on his way to his office, without any evidence on which to base such assumption. There is no evidence that Rosenbloom was the only yard clerk, some of the witnesses referred to him as assistant yard clerk (Printed record, page 67). There is no evidence of when the interstate freight came into the yards, or whether it was made up in the yards. There is no evidence as to whether Rosenbloom was going toward his office or from it. At the time he was killed Plaintiff in Error evidently had a record in its possession of the inspection of this interstate freight, which would have disclosed who inspected this interstate freight and when such inspection was made. But this Court is asked to assume that Rosenbloom was performing service on the interstate freight, or had been so doing, and was on his way to his office, without any evidence on which to base such assumption. Plaintiff in Error had pleaded as a special defense that Rosenbloom was en-

gaged in the performance of interstate service, at the time he was killed, in connection with the interstate freight, or had been so engaged immediately preceding his being killed and had not returned the record of his inspection. (See Special Charge 13, Printed record, page 50.)

The burden of proof was on Plaintiff in Error to establish this special defense. In order to raise a Federal question it was incumbent upon Plaintiff in Error to prove, not only that it was engaged in interstate commerce, but that Rosenbloom at the time he was killed was likewise so engaged. Rosenbloom's duties in the yards required him to perform service on interstate and intrastate cars. While he was inspecting, or on his way to inspect, an interstate car, he was engaged in interstate service. And while he was inspecting or on his way to inspect an intrastate car, he was engaged in intrastate commerce. In the case of Ill. Central Ry. Co. vs. Joseph Behrens, 233 U. S. Supreme Court Rep., p. 471, opinion by Justice Van Devanter, this Court said: "Giving to the words, 'suffering injury while he is employed by such carrier in such commerce,' their natural meaning, as we think must be done, it is clear that Congress' intent to confine its action to injuries occurring when the particular services in which the employe is engaged is a part of interstate commerce. The Act was so construed in Pederson vs. Delaware, L. & W. R. Co., 229 U. S. 146. It was there said (page 150), "there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employe is employed by the carrier in such commerce." Again (page 152), "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" Here at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another, that was not a service in interstate commerce and so the in-

jury and resulting death were not within the statute. That he expected, upon the completion of this task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury." Both the Court of Civil Appeals and the Supreme Court of Texas found that there was no evidence to show what Rosenbloom's purpose was in walking through the yards or what he had been doing immediately preceding his being killed, and this finding is not only supported by the evidence, but there is no evidence in conflict with such finding. True, Rosenbloom was in the middle yards walking north between tracks 4 and 5. There is no evidence that he was on duty, except the conclusion of the witness, Haney, drawn from the mere fact that he was in the yards, but suppose he was on duty, there is an entire want of evidence to show whether he was on his way to perform service on intrastate cars and therefore on duty in intrastate commerce, or on his way to perform service on interstate cars, and therefore on duty in interstate commerce. All of the Texas courts held there was no evidence to disclose in which character of service he was engaged.

5. This Court will not consider supposed errors not assigned in this Court and not presented by an assignment in the State court.

STATEMENT.

Plaintiff in Error on pages 1 to 2, also on pages 16 and 17 of its brief quotes at length from the pleading of defendants in error to the effect that Rosenbloom was engaged in service in connection with the outgoing freight, and on page 28 of said brief makes the argument that this fact was admitted and should have been treated as an admission. Again on pages 2, 3 and 4 in its brief in opposition to motion to dismiss or affirm, quotes the same pleading and makes the same argument that

it was "plain error" in the Court of Civil Appeals in refusing to treat same as an admission. There was no assignment in the trial Court, the Court of Civil Appeals, the Supreme Court of Texas, and is none in this Court challenging the action of the trial Court or either of the higher Courts in refusing to treat this pleading as an admission, or in refusing to treat it as evidence. This same argument was made in the Court of Civil Appeals (Original brief, page 33.)

6. A ruling of a State Court involving nothing more than a decision of a question of local pleading and practice, presents no Federal question, and is not open to review in the Federal Supreme Court on writ of error to the State Court.

Wabash Ry. Co. vs. Hays, 234 U. S., pp. 84-86.
Washington vs. Miller, 235 U. S., p. 420.
Central Vermont Ry. Co. vs. White, 236 U. S., p. 506.

REMARKS.

Under our Texas practice the allegations of a pleading are never treated as admissions, but only as a basis for the introduction of evidence, and the action of the Texas Courts in refusing to treat this surplus allegation as an admission, or as evidence, involves only a question of local practice and not only Federal question.

GENERAL REMARKS.

This Court should refuse to consider the third assignment for the following reason: The Supreme Court of Texas, speaking through Chief Justice Brown, just a short time prior to his death, and at a time when from old age and disease, he, doubtless, was greatly hampered in his work, undertook to make a "condensed statement" of the findings of fact of the Court of Civil Appeals. And in this "condensed statement" made an erroneous statement of practically all the material facts. When

the attention of our Supreme Court was called to the errors in this "condensed statement," the Supreme Court did not make "additional findings," as stated by Plaintiff in Error, page 11 of its brief, but *corrected* its statement of the case so as to conform to the findings of fact by the Court of Civil Appeals and wrote a new opinion. (Printed Record, page 185.) But Plaintiff in Error based its third assignment on this erroneous statement and opinion of Justice Brown, which had been corrected. (See opinion C. J. Brown, page 176. See corrected opinion, page 185. Third Assignment, page 191.)

The entire controversy in this case resolves itself into one question, to-wit: Was the evidence sufficient to require the trial Court to give special charge No. 13. (Printed Record, page 50.) The trial Court, the Court of Civil Appeals and the Supreme Court of Texas all found that it was not, and we believe such finding is amply supported by the record.

JAMES D. WILLIAMSON, of Waco, Texas,
Attorney for Mrs. M. A. Rosenbloom, et al., Plaintiff in Error.

J. A. STANFORD, of Waco, Texas,
H. H. COOPER, of Houston, Texas,
Also on Brief for Plaintiff in Error.

No. 613.

In the Supreme Court of the United States

OCTOBER TERM, 1915.

PECOS & NORTHERN TEXAS RAILWAY COMPANY
PLAINTIFF IN ERROR,

VS.

MRS. M. A. ROSENBLOOM, ET AL,
DEFENDANTS IN ERROR.

Supplemental Argument by Defendants in Error in Support of Motion to Dismiss or Affirm.

J. D. WILLIAMSON,
of Waco, Texas, Attorney for Defendants in Error.

J. A. STANFORD,
of Waco, Texas.

H. H. COOPER,
of Houston, Texas.

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DEFENDANTS IN ERROR.

Supplemental Argument by Defendants in Error in Support of Motion to Dismiss or Affirm.

As is apparent from the brief filed herein by plaintiff in error, the only issue involved in the motion to dismiss or affirm the judgment of the Supreme Court of Texas is, was the evidence sufficient to raise an issue of fact as to whether or not Rosenbloom was engaged in the performance of Interstate service at the time he was killed in connection with the outgoing freight. The defendants in error contend it was not

sufficient to raise such issue, and so no Federal question is involved. The plaintiff in error contends the evidence was sufficient to raise such issue, and that the Trial Court erred in refusing to give its Special Charge No. 13, submitting such issue to the jury, as set out in its fourth assignment of error. Plaintiff in error plead as defense in substance that Rosenbloom was engaged in the performance of service in connection with the out-going Interstate freight train at the time he was killed. The burden of proof was upon it to establish such special defense.

So the issue is narrowed down to the one question, was Rosenbloom performing any service in connection with the out-going freight; or did the evidence raise a question of fact as to whether or not he was so engaged, which should have been submitted to the jury? Suppose this issue had been submitted to the jury as requested in Special Charge No. 13, requested by plaintiff in error as insisted under its fourth assignment, what evidence is there in this record that the jury could have considered tending to establish such fact? The fact that Rosenbloom's duties required him to examine the seals on, and inspect interstate cars could not be considered as any evidence tending to establish such fact, for his general duties also required him to examine the seals on and inspect intrastate cars. Was the fact he was in the yards any evidence that he was inspecting this out-going freight? Not at all, for his duties of inspecting intrastate cars required his presence in the yards. Was the fact that he was walking through the yards between tracks 4 and 5, while said Interstate freight passed him on track 4 going in the same direction Rosenbloom was going at rate of eight or ten miles per hour, any evidence that Rosenbloom was examining the seals, etc., on the out-going freight? Not

at all, for there were seven tracks in the yards and cars were continually passing and repassing. The Court of Civil Appeals found that Rosenbloom's duties required him to examine the seals, seal any that were broken, get the numbers, etc. They also found that there were seven switch tracks in the yards and that cars were continually passing and repassing. They also found the Interstate freight was leaving the yards on track 4 at the rate of eight or ten miles per hour, and that Rosenbloom was walking between tracks 4 and 5, going in same direction, while the freight was passing him; for what purpose was not shown by any evidence, nor was it shown by any evidence what he had been doing just before he was killed. (Opinion Court of Civil Appeals, Tr. page *212 et seq.*) The circumstances surrounding Rosenbloom at the time he was killed preclude the idea that he was performing any service on the out-going freight, for he could not examine the seals on the car doors and seal any that were unsealed on a moving train, and this one was not only moving, but going at the rate of eight or ten miles per hour, and if he had been trying to perform any such service on a moving train, he would not have been walking in the same direction as the train was going, but standing still, trying to get the numbers as the cars passed him. Every circumstance surrounding Rosenbloom at the time he was killed tends to show affirmatively that he was not performing any service in connection with the out-going freight.

The eye-witnesses to the tragedy, Haney and Walker, testified that he was not looking at the out-going freight. The Court of Civil Appeals found that he was walking between tracks 4 and 5, while the freight was leaving on track 4 in same direction, going eight or ten miles per hour, when by some

means Rosenbloom got on track 5 and was knocked down by the switch engine and killed, but "for what purpose (he was walking between said tracks) was not shown by any evidence, and it was not shown what he had been doing just before he was killed." (See paragraph 10, Opinion, Tr. page *212 et seq.*) On the same point our Supreme Court said, "It was not shown here that Rosenbloom had been engaged in any service connected with the Interstate freight train, and in the state of the evidence his walking through the yards can not be said to have had any association with a duty in respect to it. The finding of the Court of Civil Appeals is definite to the effect that the evidence did not disclose for what purpose he was walking through the yards, or what character of work he had been engaged in just before his injury." (See opinion Supreme Court on rehearing, Tr. page ——.)

Plaintiff in error in its reply, brief and arguments fails to point a syllable of evidence, direct or circumstantial, that tends in the least to show that Rosenbloom was engaged in any service whatever in connection with the Interstate freight, and even does not attempt to point out any such evidence, but seems to rely solely upon the allegation of the petition of defendant in error, on which the case was tried, to the effect that he was so engaged, which it terms admissions. So the question involved in this motion really resolves itself into one of pleading. The defendants in error in their petition on which the case was tried, stated a good cause of action under the State law, and the allegation to the effect "that Rosenbloom at the time he was killed, was engaged in the performance of service in connection with the out-going freight," was surplusage and not at all necessary to the case as stated under the State law.

Plaintiff in error pleads a general denial, which, under our Texas practice, required plaintiff in the trial court to prove every material allegation, not the surplus allegations above referred to.

Plaintiff in error also, as a special defense, plead that Rosenbloom at the time he was killed was engaged in Interstate commerce, alleging that the out-going freight carried Interstate cars and that Rosenbloom at the time he was killed was engaged in service on said Interstate cars. The burden of proof was upon plaintiff in error to prove its special defense The evidence of defendant in error made a case under the State law, but showed affirmatively that Rosenbloom was not performing any service on the out-going freight. (See Ev. J. N. Haney, Tr. page ——.) In attempting to prove up its special defense, plaintiff in error wholly failed to prove that Rosenbloom was performing any service on said out-going freight, but its eye-witness to the accident, J. L. Walker, the engineer of the switch engine that ran over Rosenbloom, testified that Rosenbloom was not looking at the out-going freight. So the evidence of both plaintiff and defendant not only failed to show that Rosenbloom was performing service in connection with the out-going freight, but showed affirmatively that he was not so doing. In this state of the record, plaintiff in error in the State courts and in this court, seeks to supply an entire want of evidence, in fact seeks to overturn what all the evidence establishes on that important and essential part of its special defense, by an unnecessary and surplus allegation of the pleader in drawing the petition on which the case was tried, and that, too, without even offering it in evidence, and calls it an admission.

Under our Texas practice the allegations in a pleading are never treated as admissions, unless during the trial specifically read into the record and made a part of the statement of facts as admissions. Under our practice any part of the pleading of the adverse party may be offered in evidence, not as admissions but as declarations against interest, to be considered by the court or jury for what they are worth, as all other evidence. This surplus allegation was not offered in evidence—is not found in the statement of facts. The jury could not have considered same because not in evidence. They are never authorized to consider a pleading as evidence, unless it is introduced in evidence. So the position of plaintiff in error reduced to its final analysis is this, although there is no evidence whatever in the record tending to show that Rosenbloom was performing any service in connection with the out-going freight, yet the court erred in refusing to submit that issue to the jury, because of the surplus allegation above referred to, although the jury could not have considered same if this question had been submitted. Suppose this surplus allegation had been introduced in evidence, what probative force could it have had? Rosenbloom was killed instantly. No one got any information from him as to what he was doing. His wife and children were not present. They could not know anything about it. The evidence was fully developed. Every witness who was present and saw the accident testified fully, and none of them saw him doing anything in connection with the out-going train. Two, Haney and Walker, testified affirmatively he was not looking at the out-going train.

As stated above, reduced to its last analysis, the only point involved here is a question of pleading, or rather

the effect of a surplus allegation, which was correctly disposed of by the State court, and which presented only a question of local practice in the State court, and does not present any Federal question. (See Wabash Ry. Co. vs. Hayes, 234 U. S., pages 84-86.)

We respectfully submit the writ of error granted herein should be dismissed, or the judgment of the Texas Supreme Court should be affirmed without further consideration, and that damages should be allowed in either case.

J. D. WILLIAMSON,
of Waco, Texas, Attorney for Defendants in Error.

J. A. STANFORD,
of Waco, Texas.

H. H. COOPER,
of Houston, Texas.
Also on Brief for Defendants in Error.